(1)

No. 94-8729-CSX Title: Tina B. Bennis, Petitioner
Status: GRANTED v.
Michigan

Docketed: Court: Supreme Court of Michigan
March 29, 1995

Counsel for petitioner: Herpel,Stefan B.

Counsel for respondent: Kelley,Frank J., Ward,George E., Roberts,Larry L.

Entry	Date	Note	Proceedings and Orders
1	Mar 29 1995	G	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
3	May 3 1995		Brief of respondent Michigan in opposition filed.
4	May 10 1995		Reply brief of petitioner filed.
5	May 11 1995		DISTRIBUTED. May 26, 1995 (Page 8)
7	May 30 1995		REDISTRIBUTED. June 2, 1995 (Page 12)
9	Jun 5 1995		Petition GRANTED.
			**********
11	Jun 23 1995		Order extending time to file brief of petitioner on the merits until August 4, 1995.
12	Aug 4 1995		Brief amicus curiae of American Bankers Association filed.
13	Aug 4 1995		Brief of petitioner Tina B. Bennis filed.
14	Aug 4 1995		Brief amicus curiae of National Association of Criminal Defense Lawyers filed.
15	Aug 4 1995		Brief amicus curiae of Institute for Justice filed.
19	Aug 4 1995		Joint appendix filed.
17	Aug 17 1995		Order extending time to file brief of respondent on the merits until September 18, 1995.
20	Aug 21 1995	G	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
21	Aug 24 1995		Record filed.
		*	Partial record proceedings Michigan Supreme Court.
22	Sep 13 1995		Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
23	Sep 18 1995		Brief of respondent Michigan filed.
24	Sep 18 1995		Brief amicus curiae of United States filed.
25	Sep 18 1995		Brief amici curiae of American Alliance for Rights and Responsibilities, et al. filed.
26	Sep 28 1995		CIRCULATED.
27	Oct 3 1995		SET FOR ARGUMENT WEDNESDAY, NOVEMBER 29, 1995.(2ND CASE)
28	Oct 4 1995	G	Application (A95-313) by petitioner to file a reply brief in excess of page limits, submitted to Justice Stevens.
29	Oct 10 1995		Application (A95-313) granted by Justice Stevens, allowing a maximum of 26 pages.
30	Oct 18 1995	X	Reply brief of petitioner filed.
31	Nov 29 1995		ARGUED.

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ORIGINAL

No. 94-8729

Supreme Court, U.S.
FILED
MAR 29 1995
OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1994

TINA B. BENNIS, Petitioner

v.

STATE OF MICHIGAN ex rel. WAYNE COUNTY PROSECUTOR, Respondent

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On Petition for a Writ of Certiorari to the
Michigan Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a Michigan nuisance abatement statute that permits the forfeiture of a person's property if it is used in a proscribed manner by another person even if the owner had no knowledge of the misuse of the property violates the Due Process Clause of the Fourteenth Amendment and/or the Takings Clause of the Fifth Amendment (as applied to the states by the Fourteenth Amendment); and

2. Whether the application of that statute to deprive a wife of her interest in an automobile she jointly owned with her husband violated the Due Process Clause of the Fourteenth Amendment and the Takings Clause of the Fifth Amendment (as applied to the states by the Fourteenth Amendment), where the forfeiture resulted from a finding that the husband had engaged in a sex act with a reputed prostitute inside the automobile, and where the record established that the wife had no knowledge that her husband would use the car in the manner he was found to have used it.

LIST OF PARTIES

1. State of Michigan ex rel. Wayne County Prosecutor (Plaintiff below and respondent in the U.S. Supreme Court)

2. John Charles Bennis (Defendant below; not joining in this petition for certiorari)

3. Tina B. Bennis (Defendant below and petitioner in the U.S. Supreme Court)

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1994

TINA B. BENNIS, Petitioner

v.

STATE OF MICHIGAN ex rel. WAYNE COUNTY PROSECUTOR, Respondent

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PETITION FOR A WRIT OF CERTIORARI TO THE MICHIGAN SUPREME COURT

Tina B. Bennis respectfully petitions for a writ of certiorari to review the judgment of the Michigan Supreme Court in this case.

OPINIONS BELOW

The decision of the Michigan Supreme Court is reported at 447 Mich. 719, ___ N.W.2d ___ (1994). The opinion of the Michigan Court of Appeals is reported at 504 N.W.2d 731 (1993). The ruling of the trial court (the Wayne County Circuit Court) was made from the bench and was followed by a one-page "order/judgement," which is not reported.

JURISDICTION

The Michigan Supreme Court entered judgment on December 30, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to the U.S. Constitution provides, in pertinent part, that "[n]o State shall. . .deprive any person of life, liberty, or property, without due process of law. . .." The Fifth Amendment to the U.S. Constitution provides, in pertinent part, that "nor shall private property be taken for public use, without just compensation."

STATEMENT OF THE CASE

This case presents in the clearest way an issue which the Supreme Court has previously described as "serious" and one which the Court has formally reserved for decision on several occasions, including most recently in Austin v. United States, 509 U.S. ___, 125 L. Ed. 2d 488 (1993). That issue is whether "forfeiture of a truly innocent owner's property" would comport with the Constitution. 125 L. Ed. 2d at 502.

In this case, the respondent, Wayne County Prosecutor, confiscated a vehicle owned by John and Tina Bennis because John Bennis engaged in a sex act with a reputed prostitute inside the automobile while the car was parked on a city street. The automobile was forfeited under an old Michigan nuisance abatement statute that had never previously been applied in this fashion.[1] The order of forfeiture followed a civil, non-jury trial that was held only days after Tina and John Bennis had answered the complaint brought against them.

Unlike federal drug forfeiture statutes, the Michigan nuisance abatement statute does not exempt "innocent owners" from its application. On the contrary, it expressly provides that proof

[1]This petition for certiorari is being brought only on behalf of Tina Bennis. John C. Bennis, the other joint owner of the automobile, and a co-defendant with Tina Bennis in the nuisance abatement proceeding, is not joining in this petition for certiorari.

of the owner's knowledge of the illegal activity is not required. At trial, Tina Bennis denied having knowledge of her husband's illegal use of the vehicle. No evidence of such knowledge was offered by the Wayne County Prosecutor and the trial judge made no finding that she had such knowledge. The trial court drew no distinction between the forfeitability of her property rights in the car and those of her husband, and ordered the vehicle sold, with the proceeds to be distributed to the police, the County, and the State of Michigan.

Petitioner and her husband appealed to the Michigan Court of Appeals, asserting both statutory and constitutional bases for reversal. That Court reversed the trial court on statutory grounds, and ruled that the Prosecutor had failed to prove the elements of a nuisance under the statute so as to justify forfeiture of either of their interests in the car.

In Michigan ex rel Wayne County Prosecutor v Bennis, 447 Mich. 719, ___ N.W.2d ___ (1994), the Michigan Supreme Court reversed the intermediate appellate court 4 to 3. In so doing, it upheld, inter alia, the forfeiture of petitioner Tina Bennis' interest in the Bennis automobile against a federal constitutional challenge. Petitioner Tina Bennis argued that, as an innocent owner, the forfeiture of her interest in the Bennis car violated the Due Process Clause as well as the Takings Clause of the Fifth Amendment. Three justices of the Michigan Supreme Court joined a plurality opinion for reversal that, inter alia, rejected Tina Bennis' constitutional claim.[2]

The plurality opinion assumed for purposes of its analysis that petitioner had no prior

[2]The opinion reversing the Michigan Court of Appeals was written by Justice Riley and joined by two other justices. Justice Griffin, who provided the fourth vote for reversal, did not join the Justice Riley opinion and concurred in the result only. Bennis, 447 Mich. at 744. The basis for Supreme Court jurisdiction over this case is discussed infra at pages 6-8.

knowledge that her husband would put their car to an illegal use. The opinion then adopted the rule that a person's interest in property can constitutionally be forfeited whenever it is entrusted to another person who uses it illegally, regardless of whether the person entrusting the property has any culpability (including negligence) for the illegal use. As the plurality opinion stated, "The United States Supreme Court indisputably allows forfeiture of an innocent owner's property, unless evidence was submitted that the property was stolen or used without the consent of the owner." Bennis, 447 Mich. at 742.

The Bennis formulation of the constitutional rule, which the plurality opinion inferred from a Prohibition-era U.S. Supreme Court case, cannot be reconciled with the direction of this Court's very recent holdings in forfeiture cases, which were not even mentioned in the plurality opinion. It is also inconsistent with dicta in a 1974 decision of the U.S. Supreme Court that suggested that an owner had to at least be guilty of negligence before his or her property could be forfeited for the acts of another. A number of federal and state cases have used that dicta to fix the minimum degree of culpability the Constitution requires before an owner's interest in property may be forfeited.

The remaining four justices of the Michigan Supreme Court adopted the plurality opinion's view of the permissible scope of forfeitures under the U.S. Constitution either expressly or by implication. The fourth justice who voted for reversal concurred in the result and did not write a separate opinion. But in order to justify his vote for reversal as to Tina Bennis, he, too, necessarily had to reject Tina Bennis' constitutional claim. The three dissenting justices, while disagreeing with the plurality's statutory conclusions, did agree with that part of

the plurality opinion rejecting Tina Bennis' due process claim.[3] Those three justices joined a dissenting opinion that would have held that, as a matter of statutory construction, the misconduct of John Bennis was outside the scope of the act, and that forfeiture of the vehicle was therefore improper. At the same time, the dissenting opinion expressed agreement with the plurality opinion's conclusions concerning the constitutional issue, at least as relates to the due process claim raised on behalf of Tina Bennis. Thus, six justices of the Michigan Supreme Court have construed this Court's prior cases to hold that due process is not violated when an innocent owner's property is forfeited, so long as the property was not stolen or used without the consent of the owner, and a seventh has done the same by necessary implication.

The constitutional issue that petitioner contends was wrongly decided in Bennis is of vital importance to the nation's constitutional jurisprudence. In the last decade or more, federal and state governments have become extremely aggressive in their use of forfeiture statutes, and, as this case attests, have utilized forfeitures in increasingly novel and sweeping ways. Civil forfeiture has offered law enforcement significant procedural advantages over criminal proceedings. In large part, that is because courts until recently have generally held that the constitutional safeguards that protect defendants in criminal cases are inapplicable to civil forfeiture cases. The long trend of judicial deference to forfeitures appears to be changing as the result of recent decisions of the Supreme Court, however.

In 1993, in Austin and a few months later in United States v. Good, 510 U.S. ___, 126

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[3]Chief Justice Cavanagh wrote a dissenting opinion that was joined by Justices Brickley and Levin. 447 Mich. at 744-759. That opinion addresses the constitutional issues at page 752 and in note 8, which begins on that page. Justice Levin also wrote a separate dissenting opinion dealing exclusively with statutory issues. 447 Mich. at 759-764.

L. Ed. 2d. 490 (1993), the Supreme Court imposed two separate constitutional restraints on forfeitures. In so doing, the Court evinced a general "distrust of the Government's aggressive use of broad civil forfeiture statutes," Good, 126 L. Ed. 2d at 521 (Thomas, J., concurring in part and dissenting in part) and a concomitant desire to prevent forfeiture statutes from interfering with property rights in an arbitrary or excessive manner. In addition, the analysis in those cases also revealed a specific concern about protecting innocent owners from deprivation of their property through forfeitures, especially where, as here, the government has a "direct pecuniary interest" in the outcome of the forfeiture proceeding.

The Michigan Supreme Court decision in Bennis on the federal constitutional issue should not be allowed to stand as a precedent in Michigan and as persuasive authority in other jurisdictions faced with issues regarding the constitutionality of forfeitures of property belong to "innocent owners." This Court should grant certiorari with respect to the Supreme Court's ruling regarding Tina Bennis' interest in the automobile, in order to resolve the tension between this Court's early decisions regarding the constitutionality of forfeiture, as applied to innocent owners, and its more recent pronouncements on this issue.

THE BASIS FOR U.S. SUPREME COURT JURISDICTION

Although there is only a plurality opinion for reversal in the Michigan Supreme Court, this Court clearly has jurisdiction to review the judgment in Bennis. First, this Court has previously assumed jurisdiction in cases where there was no majority opinion supporting the state supreme court decision for which review was sought, so long as one of the opinions supporting the decision presented an adequate and independent federal ground as the basis for the holding it was urging. See United Air Lines v. Mahin, 410 U.S. 623, 630-31 (1973) This

case presents an even stronger basis for jurisdiction than Mahin, however. For, as discussed above, three of the four state supreme court justices (rather than two of four in Mahin) joined an opinion that clearly has an adequate and independent federal ground as the basis for the holding it was advocating. And here, in contrast to Mahin, there is no second opinion in support of the judgment of the Michigan Supreme Court that clearly rests on an adequate and independent non-federal ground. Rather, a fourth justice in Bennis (Justice Griffin) joined in the result without writing any opinion explaining his vote for reversal. But an examination of the issues raised leaves no doubt that the Justice necessarily had to reject Tina Bennis' constitutional claim in order to join in the judgment of the Court and uphold the forfeiture of her property interest.[4] Therefore, it can be said with complete confidence that all four justices who comprised the majority relied on adequate and independent federal grounds in voting to reverse the Michigan Court of Appeals.

In further contrast to Mahin, the three dissenting justices here joined an opinion that actually approved of the plurality's rejection of the constitutional claim, at least to the extent it alleged a due process violation. Bennis, 447 Mich. at 752, n. 8 (dissenting opinion). This means that six out of seven justices expressly rejected Petitioner's constitutional claim, and the seventh necessarily rejected it in voting with the majority.

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[4]In order to uphold the forfeiture of John Bennis' interests in their car, Justice Griffin necessarily had to find, at a minimum, that the of misconduct of John Bennis was within the scope of the nuisance abatement statute. In order to uphold the forfeiture of Tina Bennis' interest, Justice Griffin had to additionally find that the statute did not require that the owner have knowledge of the illegal use before a forfeiture could take place. In order to uphold the forfeiture in the face of her constitutional challenge, Justice Griffin necessarily had to conclude that applying the Michigan nuisance abatement statute to forfeit her property interest did not run afoul of the Constitution.

A final reason why jurisdiction is present is that if the U.S. Supreme Court were to reject the constitutional "rule" expressly adopted by the plurality and the dissent, it would definitely alter the judgment of the Michigan Supreme Court. In that event, there would be at least six unequivocal votes in favor of invalidating the forfeiture as to Tina Bennis. In Mahin, by contrast, there was only a possibility that the Supreme Court's correction of the constitutional analysis employed by the two state Supreme Court justices would definitely change the judgment. Because there is no danger here that "the same judgment would be rendered by the state court after [the U.S. Supreme Court] corrected its views of federal laws," Herb v. Pitcairn, 324 U.S. 117, 125-26 (1945), jurisdiction is present.

STATEMENT OF FACTS AND THE PROCEEDINGS BELOW

A. The Forfeiture of the Bennis Car and the Subsequent Appeals to the Michigan Court of Appeals and the Michigan Supreme Court

In early 1988, the Wayne County[5] Prosecutor's Office in Michigan announced a new policy of seizing the vehicles of persons arrested for soliciting prostitutes or for related crimes in certain Detroit-area neighborhoods. The Prosecutor's Office indicated that they would rely on an old[6] public nuisance abatement act enacted in Michigan as the statutory basis for the seizure of vehicles. Never before in its seventy-year history had the act been invoked to justify the confiscation of a vehicle used by one to visit a house of prostitution or to otherwise engage the services of a prostitute. Bennis, 47 Mich. at 760, 764 (Levin, J., dissenting).

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[5]Wayne County is the county in Michigan that includes within its boundaries the city of Detroit and a number of suburban communities.

[6]The statute is codified at M.C.L. § 600.3801 et seq. It was originally enacted in 1915, but the portion of the statute specifically relied upon by the Wayne County Prosecutor was added in 1925. Bennis, 447 Mich. at 759 (Levin, J., dissenting).

On the evening of October 3, 1988, almost immediately after the implementation of this new policy, Mr. Bennis was arrested[7] for gross indecency while he was in a car jointly owned by him and his wife (a 1977 Pontiac) that was parked on a Detroit street. The arresting officers testified that they approached Mr. Bennis's parked car, illuminated the inside with a flashlight, and observed a woman performing fellatio on Mr. Bennis in the front seat of the car. (R. 29, Trial Transcript, p. 67) Arrest records later showed that the woman had had prior arrests for, inter alia, accosting and soliciting. (Id. at 72-73)

The Bennis's car was seized and the Wayne County Prosecutor filed a civil action seeking, inter alia, a finding that the Bennis vehicle was an abatable public nuisance and that it was therefore subject to forfeiture. The nuisance abatement proceeding took place on November 2, 1988, just weeks after the complaint was filed by the Wayne County Prosecutor.[8] The respondent sought forfeiture of the Bennis' interest in their car by reason of the single instance of misconduct engaged in by Mr. Bennis in the automobile. The Bennis case was the very first case tried under the new Wayne County automobile seizure policy. (R. 29, Trial Transcript,

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[7]Subsequent to the nuisance abatement hearing, Mr. Bennis pled guilty to gross indecency, a crime under a Michigan statute. He was not charged with the crimes of soliciting and accosting or engaging services for the purpose of prostitution. Because the nuisance abatement proceedings preceded the criminal conviction, that conviction had no direct effect in the civil action.

[8]The nuisance abatement proceeding took place only 9 days after the answer to the complaint was filed by John and Tina Bennis. Under the applicable Michigan Court Rule, Rule 3.601, the plaintiff in a public nuisance action may notice the matter for hearing within 7 days of the filing of the answer. The trial judge denied a request by co-counsel for Petitioner and her husband for a 30-day adjournment to conduct discovery and prepare for trial, (R. 29, Trial Transcript, p. 23) even though they were willing to stipulate to continued detention of their car during that period. (Id. at 28-29) The trial judge also denied their request for a jury trial, saying: "By its very nature, it could not be, could not be a jury case. Go back to the Magna Carta." (Id. at 39)

p. 178)

At the nuisance abatement trial, petitioner Tina Bennis testified that she provided most of the money used to purchase the car, and that its source was savings from babysitting and similar jobs. (R. 29, Trial Transcript, p. 156) She also testified that she did not have any knowledge of her husband soliciting prostitutes. (Id. at 154) She further testified that, on the day he was arrested, she had no knowledge that he was going to do anything but came directly home from work. (Id.) Respondent Wayne County Prosecutor conceded on appeal that "the lower court transcript did not show knowledge on the part of Mrs. Bennis. . ." (Plaintiff-Appellant's Brief on Appeal to the Michigan Supreme Court, p. 29) All of this accords with the common sense notion that a wife would not have advance knowledge that her husband was planning to use their automobile in the manner the trial court found him to have used it.

The trial court ruled that the ownership interests of both John and Tina Bennis in the vehicle would be forfeited. The vehicle was ordered to be sold, with costs to the Wayne County Prosecutor and the Detroit Police Department to be deducted from the sale proceeds, and the balance to be paid to the State of Michigan. (R. 29, Trial Transcript, p. 194; R. 24, Order/Judgment of Court)

With respect to the specific interest of petitioner the trial judge made very few findings, and at one point suggested that the rights of an innocent owner would vary depending on the existence of "a different situation, different car, age of car, value, so forth." (R. 29, Trial Transcript, p. 193) The trial judge said that in other circumstances, "[he] would consider the concerns of Mrs. Bennis. . .." (Id.) He ruled that he would not do so in this case because the Bennis family had another vehicle, and because, after deducting court costs from the sale

proceeds, there would be "practically nothing left"[9] to compensate petitioner for her interest in the vehicle. (Id.)

The Michigan Court of Appeals reversed the trial court's order of forfeiture on statutory grounds in a 2 to 1 decision. State of Michigan ex rel. Wayne County Prosecuting Attorney v. Bennis, 504 N.W.2d 731 (Mich. Ct. App. 1993) The Michigan Court of Appeals held that proof of a single incident of "lewdness, assignation, or prostitution" was insufficient to establish a nuisance, and, moreover, that the County had failed to demonstrate that even a single such act had occurred. 504 N.W.2d at 733-35. The Court of Appeals also construed the nuisance abatement statute to require the County to prove knowledge on Tina Bennis' part that he used the vehicle for a purpose proscribed by the statute. Id. at 733. It held that "the record in this case does not support a finding that Mrs. Bennis knew the vehicle was being used for such purpose." Id. This alternative holding meant that, even assuming arguendo that forfeiture of the vehicle was otherwise proper, forfeiture of Tina Bennis' interest in the vehicle was not. Because the Michigan Court of Appeals decided the statutory issues in favor of John and Tina Bennis, it did not reach the constitutional issues raised on behalf of Tina Bennis.

The Michigan Supreme Court granted leave to appeal, and it reversed the judgment of the Michigan Court of Appeals in a 4 to 3 decision, thereby upholding the forfeiture. In so doing, the plurality opinion disagreed with the Court of Appeals ruling regarding the scope of

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[9]The order of forfeiture provides that all proceeds generated from the sale of the vehicle shall be used, inter alia, to reimburse the Wayne County Prosecutor for the "filing fee of this action" and "attorney costs," and the Detroit Police Department for "all police costs." The order further provided that "any remaining balance shall be paid to the general treasury of the State of Michigan." (R. 24, Order/Judgment) The trial court file contains no accounting of the amount and disposition of any proceeds realized from the sale of the vehicle.

the nuisance abatement statute. As for the constitutional claim made on behalf of Tina Bennis, that claim, as discussed above, was rejected not only by the plurality opinion, but also by the dissenting opinion, at least to the extent that the claim was grounded in the Due Process Clause. The Justice who provided the fourth vote for reversal necessarily must have rejected Tina Bennis' constitutional claim as well, though he did not write a separate opinion.[10]

B. The Michigan Supreme Court's Rejection of Petitioner's Constitutional Claim

The plurality opinion for reversal first concluded that an act of "lewdness, assignation, or prostitution" within the meaning of the nuisance abatement statute had occurred in the vehicle. 447 Mich. at 727. The opinion then construed the act to permit a forfeiture based upon a single act of lewdness in connection with an act of prostitution so long as the driver "entered into and thereby contributed to an existing condition that is a public nuisance." Id. at 734. These conclusions were dispositive of the issues regarding the forfeitability of Mr. Bennis' interest in the automobile.

Addressing the forfeiture of Tina Bennis' interest in the vehicle, the plurality opinion, construing what it said was "the plain language of the nuisance abatement statute," concluded that it "expressly obviates the requirement that an owner consent to or acquiesce in the illegal use of property."[11] 447 Mich. at 739. The plurality opinion did not purport to disturb the Court of Appeals holding that the record did not support a finding of knowledge on the part of Tina Bennis. The plurality assumed for the purposes of its analysis that she "did not have

[10]See footnote 4, supra.

[11]The nuisance abatement statute provides that, in any action brought under the act, "[p]roof of knowledge of the existence of the nuisance on the part of the defendants. . .is not required." M.C.L. 600.3815(2).

knowledge of or consent to the misuse of the Bennis vehicle, of which she was co-title owner." 447 Mich. at 740.[12] But because the opinion concluded that the statute expressly obviated the requirement to prove consent or acquiescence in the misuse of the property, forfeiture of Ms. Bennis' interest was deemed to be statutorily authorized. Id. at 737-39.

The plurality opinion then addressed whether the nuisance abatement statute or its application to Tina Bennis' interest in the automobile violated the U.S. Constitution, an issue that the Michigan Court of Appeals had not addressed. 447 Mich. at 739-743. Tina Bennis argued in the Michigan Supreme Court that, because she was an innocent owner of the automobile, the Due Process Clause of the Fifth and Fourteenth Amendments, as well as the Takings Clause of the Fifth Amendment (as applied to the states through the Fourteenth Amendment) precluded the forfeiture of her interest. (see Defendants-Appellee's Brief in the Michigan Supreme Court at 14, 15 & n. 11, 16)

The plurality opinion, relying on two decisions of the U.S. Supreme Court, rejected Tina Bennis' constitutional claim. The opinion cited to two decisions of the U.S. Supreme Court, Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974) and a Prohibition-era case, Van Oster v. Kansas, 272 U.S. 465 (1926). It read Pearson and Van Oster as establishing that, under the Constitution, "the innocent owner's interest may be abated" as long as he or she "consented to the use [of the vehicle]," even if "it [was] used in a manner to which the owner did not consent." 447 Mich. at 742 n. 36 (emphasis in original) The plurality opinion concluded that, where a person's property is used by another in an unauthorized manner, the

[12]The dissent likewise stated that "Mrs. Bennis had no knowledge that her husband used the vehicle to engage in an act of gross decency." Bennis, 447 Mich. at 756 (Cavanagh, C.J., dissenting)

United States Supreme Court "indisputably" allows forfeiture of the property, unless "evidence [is] submitted that the property was stolen or used without the consent of the owner." Id. at 742. The dissenting opinion, while suggesting that this statement "sweeps too broadly," did agree in a footnote that it correctly stated what "due process" would permit. 447 Mich. at 752 n. 8 (Cavanagh, C.J., dissenting) Thus, even the dissenting justices would say that "forfeiture of an innocent owner's property" does not violate due process, "unless. . . the property was stolen or used without the consent of the owner."[13]

The plurality opinion stated that the facts in Bennis precluded any reliance by Tina Bennis on this sole constitutional exception to forfeiture. 447 Mich. at 741. The opinion therefore concluded that the application of the statute to deprive Tina Bennis of her interest in the car gave rise to "no constitutional violation." Id. at 742. It also concluded that "the [Michigan nuisance abatement] statute does not violate the constitution." Id. at 743.

WHY THIS COURT SHOULD GRANT CERTIORARI

A. The Innocent Owner Issue is "Serious" and The Michigan Statute Leaves No Means to Avoid the Constitutional Issue

There are a number of compelling reasons why this Court should grant certiorari in Bennis. First, the Court has recently described the kind of issue raised by this case as "serious" and the Michigan nuisance abatement statute offers no statutory basis for avoiding the constitutional question. The Court in Austin recently reiterated that forfeiture of a truly innocent person's property would raise "serious constitutional questions." Austin, 125 L. Ed. 2d at 502.

[13]Citing this Court's decision in Austin, the dissent did acknowledge that forfeitures "are subject to the excessive fines constitutional provision." 447 Mich. at 452-53 n. 8. But the dissent never elaborated on what relationship, if any, this Constitutional provision has to the taking of an innocent owner's property.

Justice Kennedy was equally emphatic about the seriousness of this constitutional issue in his concurring opinion in Austin:

> At some point, we may have to confront the constitutional question whether forfeiture is permitted when the owner has committed no wrong of any sort, intentional or negligent. That for me would raise a serious question.

Austin, 125 L. Ed. 2d at 510.

The Austin majority stated that the reason it was once again reserving the question "whether it would comport with due process to forfeit the property of a truly innocent owner" was that "the forfeiture provisions at issue here exempt 'innocent owners'." Id. at 502, n. 10. That reason for declining to decide the question is not present here, however. For the nuisance abatement statute used as the basis for forfeiture in Bennis not only fails to exempt "innocent owners." The statute actually includes "innocent owners" within its reach by expressly by "expressly obviat[ing] the requirement that an owner consent to or acquiesce in the illegal use of property." Bennis, 447 Mich. at 739; M.C.L. § 600.3815(2).

B. The Michigan Supreme Court's Rejection of Tina Bennis' Constitutional Challenge Was Erroneous

Petitioner Tina Bennis contends that the Bennis analysis is defective in two respects, each of which is addressed below.

1. The Constitutional Rule Adopted by the Plurality Opinion and the Dissent Regarding the Forfeiture of an Innocent Person's Property Contradicts Dicta in a 1974 Supreme Court Case that Has been Followed by Many State and Federal Courts

As mentioned above, the plurality purported to base it constitutional rule on two decisions of this Court, its 1926 decision in Van Oster and its 1974 decision in Pearson. Van Oster and Pearson involved situations in which an owner had consented to another person's use of his or

her property, who had in turn misused it, and the owner claimed he had neither participated in nor had knowledge of the misuse. In Pearson, it was conceded that the owner was uninvolved in and unaware of the wrongful activity of his lessee, Pearson, 416 U.S. at 668; in Van Oster, the Court assumed those facts in making its holding. The petitioner in Van Oster claimed that the taking of her automobile denied her "the due process of law guaranteed by the Fourteenth Amendment." 272 U.S. at 466. The petitioner in Pearson challenged the forfeiture statute as having authorized an unconstitutional taking of its property for government use without just compensation. 416 U.S. at 680.

The Court in Van Oster rejected petitioner's constitutional claim. In doing so, it appeared to hold that, so long as a property owner consented to another person's use of his property, that person used the property unlawfully, the property could be constitutionally forfeited even where the owner had no knowledge of or involvement in the wrongful use. 272 U.S. at 467-68. The only limitation on forfeiture that was even contemplated by the Van Oster Court would involve property that was "appropriated and used by the law breaker without the owner's consent." 272 U.S. at 467. The Van Oster Court reserved decision on that issue.

In Pearson, this Court rejected, inter alia, the argument that the forfeiture statute was unconstitutional in that it authorized the taking of an innocent party's property without just compensation.[14] But the Court also made statements in dicta that would place some limitations on the ability to forfeit property that was entrusted by an owner to another person, who in turn misused it without the knowledge or participation of the owner. That dicta indicated that "it

[14]The U.S. Supreme Court also rejected the constitutional claim that the lack of preseizure notice and a hearing deprived the owner of the yacht of due process. Pearson, 416 U.S. at 676-680.

would be difficult to reject the constitutional claim of an owner. . .who proved not only that he was uninvolved in and unaware of the wrongful activity, but also that he had done all that reasonably could be expected to prevent the proscribed use of his property. . .." Pearson, 416 U.S. at 689.[15] Under the Pearson dicta, in contrast to the apparent holding in Van Oster, some type of negligence on the part of an owner who entrusts property to another would have to be present before a forfeiture could be constitutionally effected.

The Pearson dicta has been used by a number of federal and state courts to define the constitutional limits of forfeiture of the property of an owner who authorizes another to use it. See, e.g., State of New Jersey v. 1979 Pontiac Trans Am, 487 A.2d 722, 728 (N.J. 1985)[16]; United States v. One 1972 Chevrolet Blazer, 563 F.2d 1386, 1389 (9th Cir. 1977); United States

[15]The Puerto Rico statute in Pearson was modeled after 21 U.S.C. § 881(a). Pearson, 416 U.S. at 686-87, n. 25. Under that drug forfeiture statute, the government has the burden of establishing probable cause that the property is forfeitable because it was used improperly. Once probable cause is established, the burden shifts to the owner to prove either that no illegal use of the property occurred or to prove that he or she qualifies for the statutory "innocent owner" defense in section 881(a)(4). In 1973, that statutory defense was only available to persons who could prove that the illegal use was committed by somebody other than the owner who had unlawful possession of the property. Pearson, 416 U.S. at 686-87 n. 25 (quoting provisions of statute) This burden-shifting feature of drug forfeiture law may explain why the Pearson dicta placed the burden of proving a constitutional exemption from forfeiture on the owner. Under the Michigan nuisance abatement statute, by contrast, the burden of proving that an abatable nuisance occurred is always with the Prosecutor. The burden of proving any constitutionally required "culpability" on the part of an owner (including negligence) would therefore remain with the Prosecutor.

[16]In State of New Jersey v. 1979 Pontiac Trans Am, supra, the New Jersey Supreme Court, relying on the Pearson dicta, unanimously held that the Takings Clause did not permit the forfeiture of a person's property if he or she "did not consent to or know of the illegal use of their property and. . .did all that reasonably could be expected to prevent that use." 487 A.2d at 728. To avoid invalidation of the statute, the New Jersey Supreme Court construed the drug forfeiture statute to exclude that class of innocent owners. Id.

v. One (1) 1982 28' International Vessel, 741 F.2d 1319, 1322 (11th Cir. 1984); United States v. One Tintoretto Painting, 691 F.2d 603, 607 (2d Cir. 1982); United States v. One 1975 Pontiac Lemans, 621 F.2d 444, 448 (1st Cir. 1980). Moreover, statements by the Supreme Court in a more recent case, Austin v. United States, supra, reinforce the conclusion that, at least in cases where an owner entrusts his or her property to another, who in turn misuses it, this Court would hold that the Constitution requires some type of negligence on the part of the owner before a forfeiture can take place. In Austin, the Court, after citing a number of such cases decided by the Supreme Court, stated that in none of them did the Court approve a forfeiture "when the owner had done all that reasonably could be expected to prevent the unlawful use of his property." Austin, 125 L. Ed. 2d at 502. In the same vein, the Court suggested that the theory holding an owner "accountable for the wrongs of others to whom he entrusts his property" is "premised on the idea that the owner has been negligent." Id. at 502, 503.

The Michigan Supreme Court plurality opinion cited the dicta in Pearson as well as the holding in Van Oster, but, without even addressing the difference between the two approaches, ultimately adopted a constitutional rule closely resembling the Van Oster holding. That is, the plurality opinion embraced the rule that, unless property is stolen or taken from the owner without his consent, forfeiture of a person's property as a result of another person's misuse of it will not run afoul of the Constitution. The plurality adopted the rule that whenever property is entrusted to somebody else, who uses it wrongfully, forfeiture of the owner's property interest is constitutionally permissible, even if the owner is free of negligence. To that extent, the Bennis rule is plainly inconsistent with the Pearson dicta and with the numerous federal and state

cases that have used the dicta to establish constitutional limitations on forfeiture. At least one of those cases has specifically rejected a view of the constitutional limits on forfeiture like the one adopted in Bennis and has held that the Pearson dicta places additional limits on it. United States v. One Tintoretto Painting, 691 F.2d 603, 607 (2d Cir. 1982)

Besides being squarely at odds with the Pearson dicta and the cases that have applied the dicta, the constitutional rule articulated in Bennis is also difficult to reconcile with this Court's recent conclusion in Austin that past forfeitures approved by this Court have always been premised on the negligence of the owner in entrusting his property.

Petitioner likewise submits that, whatever this Court might have said in 1926, the Michigan Supreme Court's statement of the constitutional rule in Bennis would not command a majority of the Supreme Court today. Granting certiorari would enable the Supreme Court to once and for all resolve the tension between the Van Oster and other Prohibition-era holdings, on the one hand, and the dicta in Pearson, on the other hand, regarding the forfeiture of an innocent person's property. That conflict has important implications for federal and state jurisprudence and will only be deepened now that the Michigan Supreme Court has sided with the Van Oster view of the constitutional limits of forfeiture.

2. Because This is a Joint Ownership Case, Negligence in the Sense of the Pearson Dicta Cannot Arise Here

The Michigan Supreme Court's error in formulating the constitutional rule is compounded by the fact that, unlike Pearson and Van Oster, this is a case in which the property was jointly owned and the proscribed used was committed by one of the owners without the knowledge and participation of the other owner. There is real doubt that the Pearson dicta, which arose in the single owner scenario, could ever be used to justify a forfeiture of an innocent co-owner's

interest in property based upon the other co-owner's misuse of it.

As a co-owner of the Bennis vehicle, John Bennis had an independent right to use it and did not need to seek Tina's permission or authorization to do so. Because his use of the automobile did not depend on Tina Bennis' consent, and because she did not in any meaningful sense have the legal power to prevent his use, the issue of her negligence in giving consent to its use cannot even arise. In a joint owner situation, negligence of the kind that exists in the single owner situation simply cannot be present. (See Brief of Defendants-Appellees in the Michigan Supreme Court, p. 18, n. 12) As such, forfeiture of the innocent co-owner's interest in property misused by the other co-owner cannot be justified by showing that one party was negligent in permitting another to use the property. Cf. United States v. One 1977 Cherokee Jeep, 639 F.2d 212, 213 (5th Cir. 1981) (suggesting that the Pearson dicta may not apply in the situation "where one spouse is using community property for the proscribed use"); United States v. Parcel of Real Property Known as 6109 Grubb Road, 886 F.2d 618, 627 (3rd Cir. 1989) (stating that application of the Pearson dicta is "particularly daunting where. . .entireties property is involved") The rule in this context should therefore be that if the co-owner has no knowledge of the illegal use, forfeiture of his or her interest should be prohibited as being violative of both the constitutional guarantee of due process and the Fifth Amendment proscription against taking without compensation, as applied to the states through the Fourteenth Amendment. See Pearson, 416 U.S. at 694-695 (Douglas, J., dissenting)[17]

[17]Justice Stewart joined in that portion of Justice Douglas' dissent that would find the forfeiture of the Pearson Yacht Leasing Company's yacht to be a taking of property "for public use" under the Fifth Amendment, requiring payment of compensation to the innocent owner. Pearson, 416 U.S. at 690-91.

Even assuming arguendo that Tina Bennis had been the sole owner of the car, and had consented to her husband's use of the automobile, and the trial court had applied the Pearson dicta, it could not have ordered forfeiture in light of the other facts adduced at trial. It is uncontroverted that Tina Bennis had no knowledge of, and did not consent to, her husband's misuse of the automobile. Respondent Wayne County Prosecutor conceded in its brief to the Michigan Supreme Court that "the lower court transcript did not show knowledge on the part of Mrs. Bennis. . ." (Plaintiff-Appellant's Brief on Appeal, p. 29) There was no evidence that Mr. Bennis had engaged in any similar prior act, and Tina Bennis testified that she had no knowledge of any soliciting activities on his part. Thus, even if the Pearson dicta could properly be applied to this case, petitioner submits that, in light of her lack of knowledge, no reasonable trier of fact could conclude that she failed to do all that could reasonably be expected to prevent the misuse. Tina Bennis would stili be entitled to a reversal of the judgment against her, without remand on the negligence issue.

C. In Recent Years this Court Has Reversed the Long Trend of Judicial Deference to Forfeiture Statutes and Their Applications and Begun to Impose Significant Constitutional Restraints on Forfeiture

Another reason for granting certiorari is the increasing scrutiny to which the U.S. Supreme Court has subjected forfeiture statutes and their applications since 1993. In the last two years this Court, in apparent response to the increasing reliance by law enforcement on sweeping powers to confiscate property under civil forfeiture statutes, has begun to reign in those powers by subjecting them to constitutional restraint and (in the case of federal statutes) to narrowing constructions. These recent decisions of the Court have reversed a long judicial trend of deference to forfeiture statutes and their applications. In deciding these cases, the Supreme

Court has evinced a distrust of the government's exercise of broad powers to confiscate property through civil proceedings and a desire to protect innocent owners from property deprivations.

1. The Increased Reliance on Civil Forfeiture During the 1980's and Early 1990's and Judicial Deference Toward Forfeitures in that Era

The Supreme Court's 1974 decision in Calero-Toledo v. Pearson Yacht Leasing Co., supra, began a trend of judicial deference to forfeitures that was to last until 1993. As noted above, it was undisputed in that case that the yacht owner was uninvolved with and unaware of the illegal use of its yacht by its lessees. 416 U.S. at 668. There was no showing that the lessees had used the yacht for the purpose of "smuggling drugs" and apparently "only one marihuana cigarette was found on board." Pearson, 416 U.S. at 693 (Douglas, J., dissenting) By rejecting two constitutional challenges to the forfeiture under these facts, the Supreme Court clearly established a policy of judicial deference to civil property confiscations.[18]

In the years following the Court's decision in Pearson, and beginning most noticeably in the 1980's, forfeitures of property began to escalate dramatically. At the federal level, the dollar amount deposited in the Department of Justice Assets Forfeiture Fund increased from $27 million in fiscal year 1985 to $531 million in 1992. See U.S. Department of Justice, Asset Forfeiture Fact Sheet (1993). The states, too, began increasingly to rely on civil forfeiture as

[18]That judicial policy of deference to forfeiture statutes and their applications received additional impetus from the Supreme Court's decisions in United States v. Ward, 448 U.S 242 (1980) and United States v. One Assortment of 89 Firearms, 465 U.S. 354 (1984). The Court in those cases indicated that whether a particular sanction should be considered "criminal," so as to require application of certain constitutional safeguards, depended primarily on how Congress had labeled the sanction. The Court indicated that it would defer to that label unless it was contradicted by the "clearest proof." Ward, 448 U.S. at 248. Guided by this approach, the federal cases were virtually unanimous in concluding that the various constitutional protections that apply in criminal cases do not apply in civil forfeiture cases. See note 20, infra.

a law enforcement device and began applying forfeiture statutes in an extremely broad fashion.[19] The dramatic increase in property forfeitures that has occurred in the last decade or more is not surprising in light of the important procedural advantages they have offered over criminal proceedings[20] and in light of their revenue-generating potential.

2. The Supreme Court's Recent Imposition of Constitutional Limitations on Forfeitures, and its Concern that Property of Innocent Owners not be Forfeited

In two important cases decided in 1993, the Supreme Court, reversing the two-decade judicial trend against subjecting forfeiture to constitutional restraint, extended two separate constitutional protections to owners of property sought to be forfeited. In Austin v. United States, supra, the Supreme Court unanimously ruled that the Excessive Fines clause of the Eight Amendment applied to a drug-related forfeiture made pursuant to federal statute. And a few

[19]The use of the 70 year old nuisance statute to begin seizing automobiles in 1988 is by no means the only instance in Michigan involving reliance on broad interpretations of statutes to effect forfeitures. See, e.g., In re Forfeiture of 45649 Maben Rd., 434 N.W.2d 238, 240 (Mich. Ct. App. 1988), appeal denied, 442 N.W.2d 633 (1989) (accepting government's contention that house in which seven pounds of marijuana was found was forfeitable under provisions of statute permitting forfeiture of "container[s]" of controlled substances).

[20]In the 1970's and 1980's the federal courts repeatedly held that such constitutional protections as the "reasonable doubt" standard of proof, the Ex Post Facto Clause, the Sixth Amendment Confrontation Clause, the Double Jeopardy clause, and other protections accorded to defendants in criminal cases did not apply to property owners in civil forfeiture cases. See, e.g., United States v. $250,000 in U.S. Currency, 808 F.2d 895, 900 (1st Cir. 1987) (the "beyond a reasonable doubt" burden of proof standard); United States v. D.K.G. Appaloosas, 829 F.2d 532, 544-45 (5th Cir. 1987), cert. denied, 108 S. Ct. 1270 (1987) (Ex Post Facto Clause); United States v. Property Known as 6109 Grubb Road, 886 F.2d 618, 621 (3rd Cir. 1989) (Confrontation Clause); United States v. Cullen, 979 F.2d 992, 995 (4th Cir. 1992) (Double Jeopardy Clause). As a result of the U.S. Supreme Court decision in Austin and its decision last year in Department of Revenue of Montana v. Kurth Ranch, 511 U.S. ___, 128 L. Ed. 2d 767 (1994), some of those earlier holdings may no longer be defensible. See, e.g., United States v. $405,089.23 U.S. Currency, 33 F.3d 1210, 1219 (9th Cir. 1994) (relying on Austin to hold that civil forfeitures based on violation of federal drug laws constitute "punishment" for Double Jeopardy purposes)

months later, in United States v. Good, supra, the Court, distinguishing Pearson, supra, held that the Due Process Clause of the Fifth Amendment requires advance notice and a hearing prior to the seizure of real property to effect a civil forfeiture.

The Supreme Court's decisions in Austin and Good reflect its "distrust of the Government's aggressive use of broad civil forfeiture statutes," Good, 126 L. Ed. 2d at 521 (Thomas, J., concurring in part and dissenting), with its potential for arbitrary or excessive interference with property rights. Speaking for five justices, Justice Kennedy's opinion for the Court in Good described the case as illustrating the "essential principle" that "[i]ndividual freedom finds tangible expression in property rights." Good, 126 L. Ed. 2d at 508.[21] Justice Thomas, who dissented in part in Good because he believed the particular facts of the case did not establish a violation of due process, nevertheless characterized the Court's desire in Good to protect property rights as a "laudable goal." Id. at 522. Describing property rights as "central to our heritage," Justice Thomas emphasized that he was "sympathetic to [the Court's] focus on the protection of [those] rights. . .." Id. at 521.

The analysis employed by the Court in Austin and Good also reflects a specific concern that forfeiture statutes not be used to deprive an innocent person of his property. To be sure, Austin, as mentioned above, reserved ruling on the issue of whether the property of a truly innocent owner could be forfeited. But the Austin Court's conclusion that historically forfeiture has been "premised on the idea that the owner has been negligent" and has therefore "serve[d], at least in part, to punish the owner," 125 L. Ed. 2d at 503, certainly lends support to the

[21]This quotation was taken from Part II of the Court's opinion, which was joined by Justices Blackmun, Stevens, Souter and Ginsburg.

proposition that forfeiture of an innocent person's property would not pass constitutional muster, even if it may not be dispositive of that issue. See Austin, 125 L. Ed. 2d at 510 (Kennedy, J., concurring in part)[22]

In U.S. v. Good, decided a few months after Austin, the Court relied on the need to protect innocent owners from deprivation of their real property as one of the factors to justify its holding that due process required a pre-seizure notice and hearing. The Court concluded that an ex parte preseizure proceeding, in contrast to one that gives the owner notice and an opportunity to be heard, "affords little protection to the innocent owner." Good, 126 L. Ed. 2d at 504. That protection, the Court said, "is of particular importance here, where the Government has a direct pecuniary interest in the outcome of the proceeding." Id. at 504 & 504 n. 2.[23]

Finally, the Court's concern about forfeiture being visited upon innocent owners was also evident in United States v. 92 Buena Vista Avenue, Rumson, 507 U.S. ___, 122 L. Ed. 2d 469 (1993) The Supreme Court, in plurality and concurring opinions, rejected the construction of

[22]There is another sense in which the decision in Austin arguably presupposes that innocent owners have some constitutional protection from forfeiture. The Eighth Circuit decision under review in Austin had concluded that because forfeiture of the property of an innocent owner was constitutional, a fortiori the Eighth Amendment did not require proportionality review of forfeitures of property of culpable owners. Austin, 125 L. Ed. 2d at 495 (quoting from 964 F.2d at 817) The conclusion that the Eighth Amendment would not apply does seem to follow if the premise about the taking of an innocent owner's property were correct. Thus, by holding in Austin that the Eighth Amendment was applicable to civil forfeitures, the Supreme Court may impliedly have rejected the premise that the property of a truly innocent owner can be forfeited.

[23]In the case of forfeitures effected under the Michigan nuisance abatement statute, the government likewise has a "direct pecuniary interest in the outcome of the proceeding." M.C.L. § 600.3835 provides that the sale of personal property shall be "applied in payment of the costs of the action and abatement. . .." See note 9, supra.

the federal drug forfeiture statute urged by the government, and instead construed it in a way that significantly broadened the class of persons entitled to assert the innocent owner defense. 122 L. Ed. 2d at 484-85, 490-91 (plurality and concurring opinions).

The Bennis case presents the Court with another opportunity to subject broad (or broadly construed) property confiscation statutes to constitutional scrutiny and ensure that they are not used to deprive innocent owners of their property.

CONCLUSION

For all of the foregoing reasons, Tina Bennis' petition for writ of certiorari should be granted.

Respectfully submitted,

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1994

TINA B. BENNIS, Petitioner

v.

STATE OF MICHIGAN ex rel. WAYNE COUNTY PROSECUTOR, Respondent

On Petition for a Writ of Certiorari to the
Michigan Supreme Court

PETITIONER'S APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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STATE OF MICHIGAN

THE THIRD JUDICIAL CIRCUIT FOR THE COUNTY OF WAYNE

THE PEOPLE OF THE STATE OF MICHIGAN,

vs. No. 88-824-379-CZ
MOTIONS and
TRIAL

JOHN CHARLES BENNIS and
TINA R. BENNIS,

Defendants.

THE PEOPLE OF THE STATE OF MICHIGAN,

vs. No. 88-824-455-CZ
MOTIONS

LEVOY WILSON, MARIE WILSON
and CHRYSLER CREDIT CORPORATION,

Defendants.

PROCEEDINGS had in the above-entitled matters before the HONORABLE MICHAEL J. TALBOT, Visiting Judge of the Third Judicial Circuit for the County of Wayne, State of Michigan, at 1011 City-County Building, Detroit, Michigan, on Wednesday, November 2, 1988.

APPEARANCES:

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Assistant Wayne County Prosecutor

Appearing on behalf of the People of the State of Michigan

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Attorney-at-Law

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PAUL DENENFELD
Attorney-at-Law

Appearing on behalf of the all Defendants

DAVID STEINGOLD
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Appearing on behalf of Defendants Bennis

KEVIN SUMMERS
Attorney-at-Law

Appearing on behalf of Defendant Chrysler Credit Corporation

is traditionally viewed as being broader than and including the term prostitution; that the term refers to the same general class of activities which are normally associated with houses of prostitution, and is designed to designate and prohibit sex acts of whatever nature which are performed for money.

Since Mr. Bennis asserted his Fifth Amendment right not to tell the Court what he was doing and whether money had been exchanged, I would submit that now we get into the drawing of an adverse inference from the refusal to testify which was mentioned earlier and I would ask the Court to draw that inference.

THE COURT: Thank you. These matters by their very nature are tried by the Courts and have been so for centuries in terms of questions of civil relief.

The Court is not unmindful that this is the first of what may be a series of trials. So it should be -- I don't know how to say this any more sharply or clearly, I'm confining myself to, A, the arguments made as a matter of law here in this case, and B, the factual presentation as made in this case.

Whether additional arguments or different legal arguments might be advanced in the cases to follow or next week or month, you take each case as presented and the same, too, with the factual situation. The next fact situation

may differ completely from this one.

So that when the Court speaks on this, in this matter today, it is for the matter before the Court, the case before us.

I try to stress that because I don't want to be misunderstood. I'm aware of the substantial public interest and various representatives of mediums that are here. That's number one. I'm speaking only as to this case. I'm not shutting the door to arguments that might be advanced in any other lawsuit.

Second, I think it's terribly important that everybody understand as a broadbrush stroke here that we are not attempting as a State or Michigan, as I read the statute, to try to take every car involved in every act of prostitution or lewdness or assignation any time any place and I think it's strongly misunderstood that that could and/or should happen or that's what the statute calls for.

It is just the reverse or rather a requirement of this particular statute. It requires the demonstration that not only did an act of lewdness or prostitution or assignation take place and the vehicle was involved specifically or could be some other mode of transportation -- here we're dealing with a particular car, and that coupled with it there must be a demonstration that it was a public nuisance encompassed here.

A singular act some time some place is not going to be involved and every time someoody is involved in terms of this city or this county, the car is to be taken or something of that nature.

Specifically as to the testimony that this Court has heard, we have heard testimony that on October 3rd, 8:10 p.m., Officer Anthony and his partner were in the vicinity; that there had been previous arrests of the young lady in question by officer Anthony. He's familiar with her and familiar with the particular area; that observing her conduct with waving her arms back and forth on Eight Mile, in the Eight Mile/Sherfield area, he sets up a surveillance.

Some 15 minutes goes by and then Mr. Bennis in his vehicle in question, a '78 Pontiac, comes by and they then drive down onto Sherfield, a side street, and get themselves off of Eight Mile.

When the officer then observing the Pontiac turning and racing north on Sherfield, which is a residential street, the vehicle stops. The lights go off. The officer waits till he loses sight of one of the two individuals in the car, the passenger, the female.

Without belaboring it, when the officer arrives, he sees a woman's head in the lap of Mr. Bennis. That ultimately Mr. Bennis's penis is noted to be exposed and his pants are down and that the young lady's mouth comes off of

Mr. Bennis's penis.

That by any definition is an act of fellatio and an act of fellatio certainly falls as far as this Court is concerned within the definitions provided, as long as we are satisfied that it's tied in with for money or for prostitution if you will.

Now, I think additional testimony that was presenced is and it should be appreciated, this was some 7:55 or so in the evening. The officer has indicated and we stress this, I have to as far as I'm concerned look at all of the collective witnesses who testified.

If you single out a witness and say, "Well, the case rises or falls on that witness," it's true. There won't be a case. I don't know there could be a case under the statute with a single witness. Can't imagine how you would do it.

It's a fabric and you look at that collective fabric and if you will, a quilt, and you put that garment together through the series of testimony of individuals who appear before the Court.

The officer himself said that given his tasks, he has made three arrests in this immediate area. One extrapolates from that testimony that he himself has assisted other officers in making arrests. It works in that fashion by its very nature.

Miss Worthy testifies she's an assistant prosecutor. It's simply to demonstrate that no one is immune. I presume that's the demonstration or that she was willing to come forward.

I would presume this would be some moment of discomfort for someone to take time off to come to Court and indicate when you have lived in a neighborhood since mere May, 1988, and this is only the early days of November, and in one of those months she wasn't here. She was at a seminar in some other part of the country.

Since that time, she has been accosted seven to eight times while attempting to simply take a bus to go to work in the morning at 6:15 or 7:00 clock and even on Sundays when you're attempting to go to work. That it's caused her to be forced to walk on side streets rather than a main public thoroughfare of this particular community of Detroit.

Miss Kirksey indicated a necessity has arisen for the creation of a CB patrol in the area of the Green Acres, a CB patrol beyond that or a civic association that one might normally find and that she has indicated that once again as part of this fabric that in the months of July, August and September, there were some 32 observations; that they're imperfect by their very nature.

It's subjective. I concede that and also only as

good is that which someone wishes to write down. She allowed they're not on duty at all times by any means but it's part of once again the over-all fabric to look to.

She, too, has been the victim of being accosted just this past fall on Woodward in the afternoon, to suggest a very limited geographic area that you look at, probably at best a couple of square miles or a mile square, even to the area she was defining when she was accosted.

It's apparently frustration all over because the next testimony we heard was that from Miss Knight. We've heard early morning. We've heard now Miss Knight coming home at about 1:30 in the evening. She lives on the street next to the one we're dealing with here today; that there are people sitting in front of her house in automobiles at 1:30 a.m. in a residential neighborhood.

She can't say with a degree of frequency. There have been occasions where cars have actually had people getting out -- women getting out and start walking back towards the bank parking lot at Eight Mile at that hour, 2:00 and 3:00 in the morning, 1:30 in the morning, consistent even with the testimony we heard here where a car is turned around and parked to the north.

There may be a rhythm or pattern on the part of those engaged, the ladies engaged in this kind of thing that they have a strategy or reason why they want to be able to

conceivably, if a CB'er comes up, they want to get back up on Eight Mile rather than stay off on the side streets.

I don't know, but she certainly indicated she's had the situation where there's this activity, this walking about and the problems she's had, that it goes back for a number of years back to 1982.

She speaks in terms of conclusions based on appearances, clothing or lack of same, hair, time of night, to assist her as I think it's within the purview of a layperson to suggest that she believes that these women are engaged in certain forms of conduct.

Mrs. Wilson, a mature woman, volunteered that her age was 59, who also lives on Gardendale, just the next block over, she has been a resident there since 1961.

At all times, day and night, every day, 365 days of the year, that she has had to suffer, put up with the acts and frustrations of those engaging in some forms of activity in front of her home, her neighbors, that you cannot even walk along Eight Mile Road now; that even when she wants to go for a little walk in the morning, she has to have her husband trailing behind her and even there, to their credit, you had police officers who expressed concern as to her welfare.

The heightened tensions that must be existing for all of that to take place. It's rather extraordinary. It's

right off a residential neignborhood.

She's indicated cnat sne nas observed tnese young women walking back and forth, never been on a bus but always at the bus stops.

She also describes the skimpy dressing and clothing and so forth. She observed the venicles take the girls. The girls get in. Some signal. Some don't. Almost consistently and it stands to reason, stands to reason, that one doesn't engage in sexual activity for the most part while you're sitting there on Eight Mile Road. It's a little bit awkward and not the least bit dangerous.

One could use a little play on words about the risk of being rear ended or something during the course of other types of activity but it stands to reason that one is going to go off to the side streets to avoid the risks of either arrest and/or danger to themselves.

Thus, you're going to go right smack into those side streets, those neighborhoods, into a residential area of the city and I have no doubt as Mrs. Wilson described it that this is taking place all times from her testimony and from the collective testimony of the others.

She's indicated that she's of course not come upon an actual act. I don't think that the statute required that but she certainly had occasions when she's seen two heads and then only one head above the dashboard or windows and

then off one goes back to Eight Mile Road.

She's indicated that it's two to three times a week that she had been subjected to this kind of observation.

Mr. Russell, who by the very nature of his work would suggest a chap trained in both analysis and observation, has lived on Gardendale for some 20 years. He says this is a growing, growing, growing problem.

He has on two occasions -- how much do you need? Do you need two witnesses, three, five, ten? On two occasions where he's not out looking for problems and/or activity but attempting to live within his community, he has had occasion to come upon individuals at the alley south of Eight Mile and Gardendale and another time where they're outside of the vehicle in the corner behind that vacant building, both acts of fellatio.

He has been solicited by prostitutes some half a dozen times and along Eight Mile Road a month ago, on one or two occasions during the course of the summer, he's engaged in perhaps a wise and not-so-wise suggestion that some of the johns move on only to be subjected to verbal abuse and obscenities.

He has seen an increase in this activity and he has now reached the point where if he is like any other individual I know, he has a home in which some 25 percent of

his income probably goes towards the maintenance and upkeep of that home. That's the average in this country.

He now has to worry about his eight year old, five year old, those youngsters. Now can they go out and play like most of us used to do as kids or do you have to worry about your youngster then coming upon an act of prostitution, observing fellatio, cunnilingus or whatever it may be, but stay with just that before us today.

Every time you send your youngster out to play on the streets, he has already had that problem, he said, personally with the vacant lot that is just six doors north of him.

Mr. Parham then tells us that he recognizes Mr. Bennis. One of the reasons for the Court's ruling at the show cause proceeding was the risk of this type of vehicle and this type of activity continuing and that it seems to have been borne out.

Not that this vehicle was used again because I didn't allow it to be returned till such time as trial, but it is borne out to the extent that sure enough, there's a pattern if you believe Mr. Parham and I do, of conduct such that there would be substantial reason to think after you have been chased off even this summer from a neighborhood by a security guard that you elect to come right back in to that general neighborhood of some mile and mile and-a-half

away.

If you're prepared to do that, I think my judgment at the show cause proceeding has been affirmed in terms of at least holding that vehicle till a speedy trial could be had.

Some of the things that I don't fully understand, I was a little surprised. I thought frankly that this was the only vehicle that the defendants in this case had and I can well appreciate -- this is merely observation, that being the only car, that there was this true need to try to get their vehicle back in some fashion.

Now I learn there are two vehicles. This was a second car that was obtained this September for some $600.00. Well, so be it.

I don't know in every case what I'm going to do with co-title owners, holders of vehicles. I'm going to have to make a case by case determination.

I think the case law may allow for it but in terms of this Court's equity and authority, I'm going to exercise my discretion in each singular case and the remedy that I may employ depending upon the circumstances will be one of if I find the public nuisance and order the abatement, I may order after costs are deducted and vehicle sold, I may order one-half of the balance to go to what is referred to as the innocent co-title holder.

That will be done on a case by case basis depending upon the evidence and proofs submitted.

In the instance before us here -- well, see, the problem I've got is that the value is such that even under equity -- well, we'll see. I just don't know that it's going to be anything here to be concerned with. If it suggests that this Court is reaching a conclusion, yes, you may so conclude.

I have heard suggestions here by the defense counsel, Mr. Bennis's counsel, that what we should do is block off some of the streets.

We have already called upon folks in a given community, many sub-sections of this city and other communities to put bars on their windows, to have alarms on their cars, to walk in absolute fear any day or night because of their neighborhood, and the quality and condition of their neighborhood and now, let's kind of box you in or kind of build up some walls some more. Now, you can't use your streets.

That smacks of an insensitivity that I don't really think was intended.

The criminal law is designed to address the individual before the Court. Whereas the civil remedy available here is designed to address a broader problem of a public nuisance and they are truly distinguishable in that

only this civil remedy can in some instances address the problem.

One or a couple of different concerns raised, one is how can you tell a prostitute? I think it's somewhat specious to suggest that but for someone who has a card or something to hand out saying, "I'm a prostitute," that one can't draw reasonable and rational conclusions.

I suggest that the standard was set in a slightly different factual situation by the Supreme Court Justice Potter Stewart of, "I know it when I see it."

He felt that he could define obscenity and I suggest, too, that so can any layperson define someone who is actively engaging in the business of accosting and soliciting on their street corner.

When I hear the collective conduct, unless Mr. Bennis of course who did elect to take his Fifth Amendment right and I won't draw an inference against that, unless and til such time as one would be in a position to argue that, "I was with some family member" or something of that nature, it's not uncommon to have based on the conduct we have heard along that strip, I think, by a preponderance of the evidence, I can be perfectly comfortable this was a young woman engaged in business to perform an act of gross indecency and lewdness as was Mr. Bennis.

The law also it should be understood is concerning

itself here with this geographic area before us and I've heard it argued, is this too strong a remedy, this civil remedy?

I don't know that that argument would be advanced if we were -- I don't know -- at Kercheval and Moran and the type of conduct I've heard continued day in and day out, night after night and day after day, 365 days a year, or if it were along Northwestern Highway in Oakland, I wonder what hue and cry there would be.

But what we have here, the individual in this case, an individual from another community, Royal Oak, comes in to show just blatant insensitivity.

You look about you and you see people's homes where they raise their children, where their families are living, where they are having probably most of their money in this world going towards the purchase and maintenance of their home, for one's personal pleasure one contributes to what is clearly established in this case to be a public nuisance in that community, the Pembroke, Livernois, Eight Mile, Woodward community.

That sort of insensitivity is such that when one says in return, you run the risk, sir, by engaging in that sort of conduct and contributing to the public nuisance of that, you run the risk of your automobile, I find that a perfectly reasonable balance to the rights of the citizens

of that community to be free of this kind of obscene conduct within their neighborhood.

It should also be noted and I heard reference to those who engaged in prostitution. I'm sure that somewhere along the line there's been someone from the organization that Mr. McGuire is, and this is not to be denigrating, who has along the line defended in some fashion those who are engaged in prostitution.

Now suggesting a remedy is too harsh or we're insensitive, that these women are going off and no one ever does anything about the johns, closed quote.

It's true. I suggest that for men, especially particularly for men, men in the law, men in Courts, trial Courts, Appellate Courts, we are insensitive because we conceivably place ourselves in a but-for position or there but for the grace of God or whatever, some sort of mentality.

If you then say as to what remedy should we use and how should we try to solve this community problem, this public nuisance, well, I suggest to you that we have got jails. In point of fact, we don't.

Well, I suggest to you that put the prostitutes in jail and someone says, well, off she went for 60 or 90 days. No one sheds a tear, but let the john run the risk of the loss of some of his property, and everybody cries, "How

harsh, how severe a remedy."

But for the john, the young lady hasn't got any business. It's classic chauvinism and sexism where we are so concerned about some mere property rights or mere property loss, not rights, rights we should be concerned about but mere property loss versus the loss of one's freedom, if you were the prostitute, the woman, in terms of the balancing of the equities.

I find this law to be appropriate, as an appropriate remedy where the facts bear it out and the facts bore it out here, that we have a public nuisance.

I believe the remedies are such as I said that in a given situation, I would consider the concerns of Mrs. Bennis but I'm cognizant, A, there's another automobile. So, they are not without transportation.

B, I'm cognizant of the fact that there's no costs or there's practically nothing left minus costs in a situation such as this.

In a given case, I might look at a different situation, different car, age of car, value, so forth.

In the situation before me, there's really nothing to be able to be done here but fortunately there's another automobile.

If Mr. Bennis has a speck of decency left to him, let him worry about his transportation and give Mrs. Bennis

her automobile.

The venicle is deemed to be a public nuisance. It shall be abated. It shall be sold. Costs to be deducted and the balance of the monies to the State of Michigan.

We'll take 15 minutes and start the other case.

MR. BEST: Thank you, your honor.

(End Bennis trial)

***

BEST AVAILABLE COPY

CERTIFICATE

I, Lois Billiter, Certified Stenographic Reporter 0134, do hereby certify that the foregoing trial in the matter of the People of the State of Michigan versus John Charles Bennis and Tina B. Bennis, case number 88-824-379-CZ, and motions heard in the matter of the People of the State of Michigan versus Levoy Wilson, Marie Wilson and Chrysler Credit Corporation on Wednesday, November 2, 1988, at the place aforesaid, held before the HONORABLE MICHAEL J. TALBOT, Visiting Judge of the Third Judicial Circuit Court for the County of Wayne, State of Michigan, was reported by me by means of Computer-Assisted Transcription and is a true and correct transcription of my stenotype notes.

Lois Billiter

Lois Billiter, CSR 0134, RPR

Dated: Dec 22, 1988

Detroit, Michigan

#10pd

FILED IN MY OFFICE NOV 16 1988 BY

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

STATE OF MICHIGAN EX REL JOHN D. O'HAIR,
PROSECUTING ATTORNEY FOR WAYNE COUNTY,
Plaintiff

v 88-824-379 CZ

JOHN CHARLES BENNIS and TINA B. BENNIS,
Defendants/

ORDER/JUDGEMENT

At a session of said Court held in the City County Building on Nov 16 1988 the Honorable Michael J. Talbot, presiding,

This matter came before this Court pursuant to a Complaint for Abatement of a public nuisance. At the trial of this matter conducted on 2 November 1988, testimony was received from witnesses of the Plaintiff and from TINA B. BENNIS. Based on the testimony presented, in light of the arguments of counsel, and with a full understanding of the statutes and court rules and case law precedents involved in this area,

IT IS HEREBY ORDERED THAT the 1977 Pontiac, jointly owned by JOHN CHARLES BENNIS and TINA B. BENNIS, for those reasons fully stated by this Court on the record made on the trial date, is a public nuisance and that said vehicle shall be abated as provided by the controlling statute.

IT IS FURTHER ORDERED THAT the proceeds derived from the sale of said vehicle pursuant to statute shall be disposed of in the following order of priority: the filing fee of this action shall be returned to the Office of the Wayne County Prosecutor, all police costs shall be paid to the Detroit Police Department, all attorney costs shall be paid to the Office of the Wayne County Prosecutor, any remaining balance shall be paid to the general treasury of the State of Michigan.

Michael J. Talbot

Hon. Michael J. Talbot

Approved As To Form:

A. George Best II
Assistant Prosecuting Attorney

Paul J. Denenfeld
Counsel for Defendants

Order entered pursuant to 7 day rule.

[4, 5] We reject plaintiff's argument that the period of limitation had been tolled under M.C.L. § 600.5851; M.S.A. § 27A.5851 because he had been suffering from mental derangement. None of the documentary evidence submitted by plaintiffs to the circuit court show any controversy with respect to whether plaintiff was deranged at the time his claim accrued. *Makarow v. Volkswagen of America, Inc.*, 157 Mich.App. 401, 407, 403 N.W.2d 563 (1987). Although the circuit court erred in finding that plaintiff was not mentally deranged because he was able to work, see *Davidson v. Baker-Vander Veen Construction Co.*, 35 Mich.App. 293, 302-303, 192 N.W.2d 312 (1971), the evidence presents no genuine issue of material fact regarding plaintiff's sanity at the time his claim accrued. See also *Hooper v. Hill Lewis*, 191 Mich.App. 312, 316, 477 N.W.2d 114 (1991). Thus, the circuit court did not err in granting defendant summary disposition.

Affirmed.

200 Mich.App. 670

STATE of Michigan ex rel. WAYNE COUNTY PROSECUTING ATTORNEY, Plaintiff-Appellee,

v.

John Charles BENNIS and Tina B. Bennis, Defendants-Appellants.

Docket No. 132568.

Court of Appeals of Michigan.

Submitted Dec. 17, 1992, at Detroit.

Decided July 19, 1993, at 9:45 a.m.

Released for Publication Sept. 23, 1993.

In action to abate as a nuisance an automobile jointly owned by the defendants, the Circuit Court, Wayne County, Michael J. Talbot, J., entered an order of abatement, and the defendants appealed. The Court of Appeals, Murphy, J., held that: (1) prosecutor was required to prove that defendants knew their vehicle was being used for lewdness, assignation, prostitution or gambling before vehicle could be ordered abated as nuisance; (2) single alleged incident of lewdness, assignation or prostitution in defendants' vehicle was insufficient to demonstrate that vehicle was nuisance subject to abatement; and (3) prosecution failed to demonstrate that defendant engaged in act of "lewdness," "assignation," or "prostitution" in car.

Reversed.

Jansen, P.J., filed dissenting opinion.

1. Nuisance ⇐65

Prosecutor was required to prove that defendants knew their vehicle was being used for lewdness, assignation, prostitution or gambling before vehicle could be ordered abated as nuisance. M.C.L.A. §§ 600.3801, 600.3815(2).

2. Nuisance ⇐84

Record would not support finding that defendant wife had knowledge that defendant husband was using their jointly owned vehicle for purposes of lewdness, assignation or prostitution, precluding abatement of vehicle as nuisance. M.C.L.A. §§ 600.3801, 600.3815(2).

3. Nuisance ⇐65

Single alleged incident of lewdness, assignation or prostitution in defendants' vehicle was insufficient to demonstrate that vehicle was "nuisance" subject to abatement; circumstances did not permit reasonable inference that conduct was habitual, notwithstanding lengthy discussion of reputation and record of woman found in car with defendant husband, or testimony that husband had been seen on multiple occasions driving in area and talking to women. M.C.L.A. § 600.3801.

See publication Words and Phrases for other judicial constructions and definitions.

4. Nuisance ⇐65

Statute providing for abatement as nuisance of property where lewdness, assignation or prostitution takes place was enacted to subject houses of prostitution to abatement as nuisances, and was not intended to regulate morality of individuals, or to prevent incidents of immorality in otherwise respectable establishments. M.C.L.A. § 600.3801.

5. Nuisance ⇐65

Prosecution failed to demonstrate that defendant engaged in act of "lewdness," "assignation," or "prostitution" in car, so as to support abatement of car as nuisance, absent proof that sexual activity in which defendant was engaged with woman previously arrested for prostitution was in exchange for money, notwithstanding that defendant's conduct may have been lewd or an assignation in general sense, and notwithstanding that his conduct could be equated with gross indecency, and was therefore arguably disorderly. M.C.L.A. § 600.3801.

See publication Words and Phrases for other judicial constructions and definitions.

6. Nuisance ⇐65

While "lewdness" may be defined more broadly in common sense of word, in statute providing for abatement as nuisance of property in which lewdness, assignation or prostitution takes place, "lewdness" is confined to acts of prostitution. M.C.L.A. § 600.3801.

Frank J. Kelley, Atty. Gen., Thomas L. Casey, Sol. Gen., John E. O'Hair, Pros. Atty., Andrea Solak, Chief, Sp. Operations, and Larry L. Roberts, Asst. Pros. Atty., for plaintiff-appellee.

ACLU Fund of Michigan by Paul J. Denenfeld, Detroit, for defendants-appellants.

Before JANSEN, P.J., and MURPHY and MARILYN J. KELLY, JJ.

MURPHY, Judge.

Defendants appeal from a judgment of the circuit court declaring their 1977 Pontiac automobile to be a nuisance and abating the nuisance, thereby terminating their interest in the automobile. We reverse.

Defendant John Bennis was convicted of gross indecency, M.C.L. § 750.338b; M.S.A. § 28.570(2), following an incident in which police officers observed Mr. Bennis engaging in a sexual act with a woman in defendants' 1977 Pontiac. Plaintiff then filed this action, alleging that Mr. Bennis used defendants' car for the purpose of lewdness, assignation, or prostitution, in violation of M.C.L. § 600.3801; M.S.A. § 27A.3801, and that the car was therefore a nuisance subject to abatement pursuant to M.C.L. § 600.3825; M.S.A. § 27A.3825. The circuit court declared the car to be a nuisance and abated the nuisance, terminating defendants' interest in the automobile.

[1] Defendants first contend that they were entitled to summary disposition pursuant to M.C.R. § 2.116(C)(8) because plaintiff failed to demonstrate that defendant Tina Bennis had knowledge that her husband, defendant John Bennis, was using the vehicle, which they jointly owned, for purposes of lewdness, assignation, or prostitution. We agree that the prosecution was obligated to demonstrate that defendants knew of the use of the vehicle as a nuisance before the nuisance could be ordered abated.

The statutes relating to public nuisance provide for declaring certain property to be a nuisance where "lewdness, assignation or prostitution or gambling" takes place on that property. M.C.L. § 600.3801; M.S.A. § 27A.3801 provides, in pertinent part:

> Any building, vehicle, boat, aircraft, or place used for the purpose of lewdness, assignation or prostitution or gambling, or used by, or kept for the use of prostitutes or other disorderly persons, ... is declared a nuisance, ... and all ... nuisances shall be enjoined and abated as provided in this act and as provided in the court rules. Any person or his or her servant, agent, or employee who owns, leases, conducts, or maintains any building, vehicle, or place used for any of the

purposes or acts set forth in this section is guilty of a nuisance.

M.C.L. § 600.3805; M.S.A. § 27A.3805 authorizes prosecuting attorneys, among others, to bring an action for equitable relief to abate a nuisance. M.C.L. § 600.3825; M.S.A. § 27A.3825 provides for the issuance of an order of abatement and sale of property found to be a nuisance, including vehicles.

M.C.L. § 600.3815(2); M.S.A. § 27A.3815(2) provides that "proof of knowledge of the existence of the nuisance on the part of the defendants or any of them, is not required." The Michigan Supreme Court, however, has held that, regardless of this statutory language, proof of knowledge is required for abatement. In *People v. Schoonmaker*, 241 Mich. 177, 181, 216 N.W. 456 (1927), our Supreme Court stated:

> Defendants did not maintain a nuisance unless they permitted such illegal use of the premises; that is, consented to it or acquiesced, and whether they did so was a question of fact, not established by efforts to prevent misuse of the premises but only by some evidence disclosing permissive use....
>
> ... That transgressions may happen is possible, but remain offenses of the wrongdoer unless tolerated by the occupant to the extent of permissive use of the premises for such purpose or indifference thereto. The statute does not deprive one person of the use of his property by reason of the illegal acts of another, unless the owner's use bears a participating relation to the violation.

In subsequent decisions, the Supreme Court has held that the statute obviates the need for proof of knowledge, and apparently has ignored *Schoonmaker*, as noted by this Court in *State ex rel. Oakland Co. Prosecutor v. Motorama Motel Corp.*, 105 Mich.App. 224, 228, 307 N.W.2d 349 (1981). See *People ex rel. Wayne Prosecuting Attorney v. Bitonti*, 306 Mich. 115, 119, 10 N.W.2d 329 (plurality) (1943); *People ex rel. Wayne Prosecuting Attorney v. Tate*, 306 Mich. 667, 669, 11 N.W.2d 282 (1943); *State ex rel. Attorney General v. Robinson*, 250 Mich. 99, 103, 229 N.W. 403 (1930). The *Schoonmaker* view has recently received support, however, in *State ex rel. Wayne Co. Prosecuting Attorney v. Levenburg*, 406 Mich. 455, 462, n. 1, 280 N.W.2d 810 (1979), in which our Supreme Court stated in dicta: "However, we acknowledge that a judgment for abatement in a prosecution of this nature cannot be rendered without a finding of knowledge of the accosting and soliciting on the part of the owners or operators of the place found to be a nuisance and their acquiescence in those activities."

[2] Considering that *Schoonmaker* has never been expressly overruled, and in light of the comment in *Levenburg*, we follow the *Schoonmaker* analysis, as this Court did in *Motorama*, *supra*, and *State ex rel. Wayne Prosecuting Attorney v. Weitzman*, 21 Mich.App. 705, 710–711, 176 N.W.2d 463 (1970). We therefore hold that the prosecutor was required to prove that defendants knew that their vehicle was being used for a purpose set forth in M.C.L. § 600.3801; M.S.A. § 27A.3801. We further hold that the record in this case does not support a finding that Mrs. Bennis knew that the vehicle was being used for such purpose.

[3] Defendants next contend that the claimed nuisance could not be abated because only one incident of lewdness, assignation, or prostitution was alleged before the trial court, and that this is insufficient to demonstrate a nuisance. We agree. In *Motorama*, the plaintiff alleged that, on one occasion, a police officer was accosted and solicited by an unknown female at a bar and that she then took the officer across the street to the defendant's hotel. The trial court granted the defendant summary disposition, holding in part that the one instance of lewdness and assignation alleged by the plaintiff was insufficient to support a claim of nuisance. This Court affirmed, holding that a single alleged incident is insufficient to create a nuisance unless circumstances are such that a reasonable inference can be drawn that the conduct was habitual. *Id.*, 105 Mich.App. at 229–230, 307 N.W.2d 349; see also *Bitonti*, *supra*, 306 Mich. at 119–120, 10 N.W.2d 329 (Justice Chandler). The facts in *Motorama* were insufficient to permit such an inference, even though the affidavit of the police officer in question stated that there had been numerous arrests of females in that area for solicitation at the bar across from the defendant's hotel. *Id.*, 105 Mich.App. at 226, 229–230, 307 N.W.2d 349.

[4] The *Motorama* approach best effectuates the purpose of the statute. The abatement statute was enacted to subject houses of prostitution to abatement as nuisances. *State ex rel. Wayne Co. Prosecutor v. Diversified Theatrical Corp.*, 396 Mich. 244, 246–250, 240 N.W.2d 460 (1976). The purpose of the act has also been described as eliminating the use of property in connection with gambling, prostitution, and the illicit sale of liquor. *People ex rel. Wayne Prosecuting Attorney v. Sill*, 310 Mich. 570, 575, 17 N.W.2d 756 (1945); *State ex rel. Oakland Prosecuting Attorney v. Ginell*, 159 Mich.App. 679, 681–682, 407 N.W.2d 59 (1987). The statute is not intended to regulate the morality of individuals, or to prevent incidents of immorality in, for example, hotels that are otherwise respectable establishments. See *Diversified Theatrical Corp.*, *supra*, 396 Mich. at 247, 240 N.W.2d 460.

As in *Motorama*, we hold that a single incident is insufficient to establish a nuisance. Further, the circumstances of this case do not permit a reasonable inference that the conduct was habitual. In this case, the prosecution has alleged only a single incident to support the contention that defendants' car was a nuisance. While the prosecution discusses at length the reputation and record of Kathy Palarchio, the woman found in the car with Mr. Bennis, this does not establish that defendants' car was used on more than that occasion for lewdness, assignation, or prostitution. Similarly, testimony was presented that Mr. Bennis was seen on more than one occasion driving in that area and talking to women. Not only does this observed conduct not prove that defendant was involved in lewdness, assignation, or prostitution, there was no evidence to establish that this conduct, if it occurred, took place in the vehicle in question. In fact, defendants allegedly purchased the car only three weeks before the incident that gave rise to this action.

The dissent in this case states that the mobile nature of a vehicle, as compared to real property, justifies finding the vehicle to be a nuisance upon proof of only one incident of prohibited conduct. The dissent reasons that to require proof that the vehicle was used on more than one occasion for a purpose proscribed by the statute would thwart the purpose of the public nuisance statute. While the prohibited conduct would indeed have to be observed on more than one occasion, that is the very nature of a nuisance. *Motorama*, *supra*, 105 Mich.App. at 229–230, 307 N.W.2d 349. In fact, if conduct happens so rarely that authorities investigating the situation are unable to observe a recurrence of the conduct, we would hesitate to find a nuisance. Just as one incident of prostitution does not create a brothel out of a family hotel, neither does one isolated incident of prohibited conduct in a vehicle necessarily make the vehicle a nuisance.

[5] Defendants further contend that the prosecution failed to demonstrate that an act of lewdness, assignation, or prostitution occurred in the car and that the abatement provisions are therefore inapplicable. We agree. After the incident in question, Mr. Bennis apparently was charged with one count of gross indecency, M.C.L. § 750.338b; M.S.A. § 28.570(2).[1] The record indicates that Mr. Bennis was found in the car in an area apparently known for prostitution and was engaged in
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Reversed.

MARILYN J. KELLY,

JANSEN, Presiding Ju

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parently known for prostitu-

rosecution agrees in its brief on
er, that defendant John Bennis
nly with gross indecency, and
that there is no evidence that Mr.
intended to pay Ms. Palarchio.

tion and was engaged in sexual activity with a woman previously arrested for prostitution. Defendant was only charged with gross indecency, however, presumably because there was no proof that the activities in which Mr. Bennis and Ms. Palarchio were engaged involved the payment of money.

[6] Our Supreme Court in *Levenburg* noted that while assignation is generally defined as an appointment for a meeting, especially between lovers, the term as used in the abatement act is limited to the making of an appointment for purposes of prostitution. *Levenburg, supra*, 406 Mich. at 465–466, 280 N.W.2d 810. Similarly, while lewdness may be defined more broadly in the common sense of the word, in the abatement act the term is confined to acts of prostitution. See *Diversified Theatrical Corp., supra*, 396 Mich. at 246–250, 240 N.W.2d 460. This construction of the terms is sensible, considering that the purpose of the statute is to eliminate repeated prostitution in a specific location. Thus, while Mr. Bennis' conduct in his car may have been lewd or may have been an assignation in a general sense, there is no demonstration that the conduct was that which is prohibited by the statute, absent proof that the sexual activity was in exchange for money.[2]

Reversed.

MARILYN J. KELLY, J., concurred.

JANSEN, Presiding Judge (dissenting).

I respectfully dissent. I would affirm the November 16, 1988, judgment entered by the Wayne Circuit Court declaring defendants' 1977 Pontiac automobile to be a nuisance and terminating their interest in the automobile.

Defendants contend that the trial court erred in denying their motion for summary disposition brought pursuant to M.C.R. § 2.116(C)(8). Specifically, defendants argue that plaintiff's complaint failed to allege more than one isolated instance of use of the 1977 automobile for purposes of lewdness, assignation, or prostitution and failed to allege knowledge of, consent to, or acquiescence in the alleged nuisance by Tina Bennis. I disagree.

A motion for summary disposition based on a failure to state a claim upon which relief can be granted is to be tested by reference to the pleadings alone, and all well-pleaded material allegations must be taken as true. *State ex rel. Oakland Co. Prosecutor v. Motorama Motel Corp.*, 105 Mich.App. 224, 226, 307 N.W.2d 349 (1981). The standard is whether the plaintiff's claims are so clearly unenforceable as a matter of law that no factual development could possibly justify a right to recovery. *Id.*

Defendants maintain that plaintiff's complaint was insufficient because it failed to allege that Tina Bennis had knowledge of, consented to, or acquiesced in the use of the automobile by her husband to create a nuisance. The majority held that "the prosecution was obligated to *demonstrate* that defendants knew of the use of the vehicle as a nuisance before the nuisance could be ordered abated." (Emphasis added.) I disagree.

It is not disputed that the title to the 1977 automobile indicated that Tina Bennis and John Bennis were its owners. M.C.L. § 600.3815(2); M.S.A. § 27A.3815(2) specifically and unambiguously provides that "[p]roof of knowledge of the existence of the nuisance on the part of the defendants or any of them, is not required." The statute expressly obviates the necessity of proof of knowledge of the existence of the nuisance on the part of defendants. *People ex rel. Wayne Prosecuting Attorney v. Bitonti*, 306 Mich. 115, 119, 121, 10 N.W.2d 329 (1943); *State ex rel. Attorney General v. Robinson*, 250 Mich. 99, 103, 229 N.W. 403 (1930). But see *People v. Schoonmaker*, 241 Mich. 177, 216 N.W. 456 (1927); *State ex rel. Wayne Prosecuting Attorney v. Weitzman*, 21 Mich.App. 705, 176 N.W.2d 463 (1970). "Obviously, where proof of knowledge is unnecessary, allegations of the owner's knowledge are not required to state a statutory cause of action." *State ex rel. Oakland Co. Prosecuting Attorney v. Weaver*, 74 Mich.App. 462, 464, 254 N.W.2d 68 (1977).

I recognize that our Supreme Court has held, as noted by the majority, that proof of knowledge is required for abatement. *Schoonmaker, supra*. However, I also recognize that subsequent decisions of the Supreme Court have held that the statute, M.C.L. § 600.3815(2); M.S.A. § 27A.3815(2), obviates the need for proof of knowledge. *Bitonti, Robinson, supra*. See also *People ex rel. Wayne Prosecuting Attorney v. Tate*, 306 Mich. 667, 669, 11 N.W.2d 282 (1943). Given the clear, unambiguous language of the statute, I am convinced that *Bitonti, Tate, Robinson*, and *Weaver* are correct. I would hold that plaintiff was not required to allege knowledge on the part of Tina Bennis.

Defendants also claim that plaintiff failed to allege more than one isolated instance of use of the 1977 automobile for the purpose of lewdness, assignation, or prostitution. I would hold that plaintiff was not required to allege more than one use of the vehicle for the purposes proscribed in the statute.

Because of the unique characteristics of an automobile, and in particular its mobility, I would follow the opinion of Justice Bushnell in *Bitonti, supra*. In *Bitonti*, the Court held "that proof of only one isolated instance of violation of the statute was sufficient." *Id.*, 306 Mich. at p. 122, 10 N.W.2d 329. I am convinced that this is the proper interpretation to be given the public nuisance statute when a vehicle is used for the purpose of lewdness, assignation, or prostitution. The statute specifically provides that any vehicle used for the purpose of lewdness, assignation, or prostitution is declared a nuisance. M.C.L. § 600.3801; M.S.A. § 27A.3801. The statute does not require protracted use of the vehicle for purposes of lewdness, assignation, or prostitution, and in a case such as this, where the automobile is used as an indispensable part of the statutory violation, I would hold that a single incident is sufficient to sustain a finding of nuisance.

I am mindful that cases such as *Motorama Motel Corp., supra*, have held that a "nuisance involves the notion of repeated or continuing conduct and should not be based upon proof of a single isolated incident unless the facts surrounding the incident permit the reasonable inference that the prohibited conduct was habitual in nature." *Id.*, 105 Mich.App. at pp. 229–230, 307 N.W.2d 349. However, *Motorama Motel Corp.* involved a police officer who was accosted and solicited by a female at the Last Chance Bar and was then taken across the street to the defendant's motel by the female. *Id.*, at p. 225, 307 N.W.2d 349. The officer's affidavit indicated that the motel was only used for that purpose on a single occasion. *Id.*, at p. 230, 307 N.W.2d 349.

Given the obvious and inherent differences between a stationary or fixed building or structure and a mobile vehicle, it is my opinion that the better-reasoned rule allows a finding of public nuisance on the basis of a single instance of conduct involving the use of a vehicle for the purpose of lewdness, assignation, or prostitution. A building or fixed structure may be subject to continuous surveillance for the purpose of determining whether the premises are continuously or repeatedly being used for the purpose of lewdness, assignation, or prostitution. However, when a vehicle is used for any of the purposes set forth in M.C.L. § 600.3801; M.S.A. § 27A.3801, the authorities would have to determine that the same car was being used on a continuous or repeated basis for purposes proscribed by the statute. Because of the mobility of a vehicle, this would surely be nearly impossible.

As the majority notes, the purpose of the statute is to eliminate the use of property in connection with gambling, prostitution, and the illicit sale of liquor. *People ex rel. Wayne Prosecuting Attorney v. Sill*, 310 Mich. 570, 575, 17 N.W.2d 756 (1945); *State ex rel. Oakland Prosecuting Attorney v.*

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2. Nor is Mr. Bennis' conduct included within the nuisance statute merely because his conduct can be equated with gross indecency, and was therefore arguably disorderly. See *Diversified Theatrical Corp, supra*, 396 Mich. at 246, 250, 240 N.W.2d 460; *State ex rel. Oakland Prosecuting Attorney v. Alray Northcrest Plaza*, 146 Mich. App. 595, 602–604, 381 N.W.2d 731 (1985).

automobile is used as an part of the statutory viola- old that a single incident is stain a finding of nuisance. that cases such as *Motorama*, *supra*, have held that a ives the notion of repeated conduct and should not be oof of a single isolated inci- facts surrounding the inci- e reasonable inference that conduct was habitual in na- Mich.App. at pp. 229-230, . However, *Motorama Mo-* ed a police officer who was olicited by a female at the Bar and was then taken et to the defendant's motel *Id.*, at p. 225, 307 N.W.2d er's affidavit indicated that only used for that purpose casion. *Id.*, at p. 230, 307

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Ginell, 159 Mich.App. 679, 681-682, 407 N.W.2d 59 (1987). To require plaintiff to prove that the same vehicle was used on numerous occasions for purposes proscribed by the statute would thwart the purpose of the public nuisance statute.

Defendants also argued that the trial court erred in finding that a public nuisance existed where the evidence failed to show that John Bennis engaged in more than one isolated instance of proscribed conduct. Defendants further argue that there was no evidence presented to establish that Bennis paid Palarchio for performing the sexual act and that the conduct between Bennis and Palarchio was consensual.

As I have stated, it is my opinion that when a vehicle is used for the purpose of lewdness, assignation, or prostitution, proof of a single instance of conduct will support a finding that the vehicle constitutes a public nuisance pursuant to M.C.L. § 600.3801; M.S.A. § 27A.3801. Additionally, I am convinced that sufficient evidence was presented to establish that the Bennises' vehicle was used for the purpose of lewdness, assignation, or prostitution.

In *State ex rel. Macomb Co. Prosecuting Attorney v. Mesk*, 123 Mich.App. 111, 333 N.W.2d 184 (1983), this Court noted that the Supreme Court, in *State ex rel. Wayne Co. Prosecutor v. Diversified Theatrical Corp.*, 396 Mich. 244, 240 N.W.2d 460 (1976), found the meaning of the terms lewdness, assignation, and prostitution, as used in the abatement statute, to be clear. *Mesk*, 123 Mich.App. at p. 116, 333 N.W.2d 184. Although the Court in *Diversified Theatrical Corp.* did not expressly define the terms, it quoted from *Chicago v. Geraci*, 30 Ill.App.3d 699, 703, 332 N.E.2d 487 (1975), as follows:

> However, we find no confusion in the meaning of these terms. Although traditionally the term "lewdness" is viewed as being broader than and including the term "prostitution," ... such terms refer to *the same general class of activities* which are normally associated with houses of prostitution (or whatever such establishments may be called). They are intended to designate and prohibit sex acts of whatever nature which are performed for money. [Citation omitted; emphasis in *Diversified Theatrical Corp*, 396 Mich. at 250, n. 13, 240 N.W.2d 460.]

The majority states that John Bennis apparently was only charged with one count of gross indecency, M.C.L. § 750.338b; M.S.A. § 28.570(2), "presumably because there was no proof that the activities in which Mr. Bennis and Ms. Palarchio engaged were in exchange for payment." However, a review of plaintiff's complaint reveals that Bennis and Palarchio were arrested and charged with indecent and immoral conduct, specifically, engaging the services of a prostitute, M.C.L. § 750.449a; M.S.A. § 28.704(1), and gross indecency between male and female persons, M.C.L. § 750.338b; M.S.A. § 28.570(2).

Testimony indicated that on March 3, 1988, John Bennis was driving home from work in the 1977 Pontiac automobile. Bennis stopped the car at the corner of Eight Mile and Sheffield, where a young woman, Palarchio, was standing. At the time Bennis stopped his vehicle, he was being observed by two Detroit police officers who were working undercover for the vice squad.

Before Bennis stopped his vehicle, the officers observed Palarchio "flagging" cars in an effort to get them to stop. When Bennis stopped his vehicle, Palarchio walked to the passenger's side and entered the car. Bennis drove down the street, made a U-turn, parked, and turned off the car's headlights.

The officers followed, and parked approximately three car lengths behind the 1977 Pontiac. Officer Anthony testified that he saw two heads in the car, a female head on the right side and a male head on the left. Immediately after the officers parked their vehicle, the female head disappeared toward the driver's side of the car. The officers approached the vehicle and observed Palarchio performing an act of fellatio on Bennis.

Officer Anthony testified that it was a known fact that Palarchio had been working as a prostitute. She had been arrested many times before on charges of accosting and soliciting, indecent and obscene conduct, and disorderly conduct. Palarchio had also been arrested for "flagging" vehicles in an attempt to get them to stop.

I would find that the evidence was sufficient to support a finding that John Bennis used his vehicle for the purpose of lewdness, assignation, or prostitution. The trial court could properly infer from all the evidence presented that John Bennis, while occupying the 1977 Pontiac, engaged the services of Palarchio for the purpose of lewdness, assignation, or prostitution. Clearly, prostitution includes an act of fellatio. *Mesk*, 123 Mich.App. at p. 117, 333 N.W.2d 184.

Additionally, the trial court did not err in ordering abatement of the nuisance and extinguishing the proprietary interest of the innocent co-owner, Tina Bennis. As noted above, M.C.L. § 600.3815(2); M.S.A. § 27A.3815(2) obviated the requirement of proof of a defendant's knowledge of the existence of the nuisance. *Tate*, *Bitonti*, *Robinson*, *Weaver*, *supra*. Plaintiff was not required to show knowledge on the part of Tina Bennis.

I would affirm the judgment of the trial court declaring defendants' 1977 Pontiac automobile to be a nuisance and terminating their interest in the automobile.

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first-degree criminal sexual conduct, and he appealed. The Court of Appeals, Connor, J., held that: (1) prior consistent statements of ten-year-old complainant could be admitted once defendant impeached complainant's credibility by introducing prior inconsistent statements, and (2) complainant's invocation of physician-patient privilege did not preclude admission of treating physician's testimony at defendant's first trial, when privilege was waived.

Reversed and remanded.

Marilyn J. Kelly, J., concurred in result.

1. Witnesses ⇐414(2)

Prior consistent statements of ten-year-old complainant were admissible in prosecution for first-degree criminal sexual conduct after defendant impeached complainant's credibility by introducing portions of statements to show how they were inconsistent with complainant's trial testimony.

2. Witnesses ⇐211(2)

Physician-patient privilege statute prohibited ten-year-old complainant's doctor, who had conducted rectal examination of complainant shortly after anal penetration was alleged to have taken place and found no evidence of trauma, from testifying in prosecution for first-degree criminal sexual conduct once privilege was asserted. M.C.L.A. § 600.2157.

3. Witnesses ⇐219(5)

Complainant's waiver of physician-patient privilege at defendant's first trial did not prevent assertion of privilege at new trial granted on charge of first-degree criminal sexual conduct. M.C.L.A. § 600.2157.

4. Witnesses ⇐219(4.1)

Invocation of physician-patient privilege by ten-year-old complainant in prosecution for first-degree criminal sexual con-

200 Mich.App. 594

PEOPLE of the State of Michigan, Plaintiff-Appellee,

v.

Allen J. SAYLES, Defendant-Appellant.

Docket No. 123576.

Court of Appeals of Michigan.

Submitted March 2, 1993, at Lansing.

Decided July 19, 1993, at 9:05 a.m.

Released for Publication Sept. 23, 1993.

Defendant was convicted in the Lapeer Circuit Court, Martin E. Clements, J., of

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duct did not bar admissi sician's testimony given trial, when privilege was § 600.2157; MRE 804(a

5. Criminal Law ⇐117

Trial court's error i ten-year-old complainan physician-patient privile sion of treating physicia defendant's first trial, had been waived, was prosecution for first-deg conduct, where physic rectal examination of after anal penetration taken place but found ma. M.C.L.A. § 600.21 (b)(1).

Frank J. Kelley, Att Casey, Sol. Gen., Nick Atty., and Todd C. Moh for the people.

Matthew Posner, Su defendant on appeal.

Before MICHAEL J. MARILYN J. KELLY

CONNOR, Judge.

A jury found defen degree criminal sexu § 750.520b(1)(a); M.S. The trial court senter prison. Defendant a We reverse.

Defendant was char of criminal sexual con old complainant testi was nine years old, def in several acts of sex her.

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MICHIGAN *ex rel* WAYNE COUNTY PROSECUTOR v BENNIS

Docket No. 97339. Argued October 5, 1994 (Calendar No. 5). Decided December 30, 1994.

The Wayne County Prosecutor brought an abatement action in the Wayne Circuit Court, contending that a vehicle owned by John C. and Tina Bennis, used in an act of prostitution involving John Bennis, was a public nuisance under MCL 600.3801; MSA 27A.3801. Tina Bennis claimed she did not know that the vehicle had been used in violation of the statute and, thus, that her interest could not be abated. The court, Michael J. Talbot, J., held that the vehicle was a nuisance and abated the interest of the defendants. The Court of Appeals, MURPHY and MARILYN J. KELLY, JJ. (JANSEN, P.J., dissenting), reversed, holding that under *People v Schoonmaker*, 241 Mich 177 (1927), the prosecution failed to prove that Tina Bennis knew the defendant used the vehicle in a manner proscribed by the statute; that it failed to demonstrate that an act of lewdness, assignation, or prostitution occurred; and that proof of a single incident of lewdness, assignation, or prostitution is insufficient to establish a nuisance (Docket No. 132568). The people appeal.

In an opinion by Justice RILEY, joined by Justices BOYLE and MALLETT, with Justice GRIFFIN concurring only in the result, the Supreme Court reversed the decision of the Court of Appeals.

Justice RILEY, joined by Justices BOYLE and MALLETT, stated that lewdness, incidental to an act of prostitution, is activity squarely within the purview of the nuisance abatement statute. Proof of an exchange of money is not necessary where it is clear from the totality of circumstances that the sexual act was in exchange for payment. In this case, the abatement of the vehicle was proper. The defendant entered a neighborhood known for prostitution and used his vehicle to engage in illicit activity, thereby contributing to an existing nuisance. Under the nuisance abatement statute, knowledge or consent is not required to abate the interest of a co-owner.

The nuisance abatement statute requires that the act committed be one of lewdness, assignation, or prostitution. Conduct constituting lewdness or assignation is limited to those instances in which an act occurs in furtherance or for the

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purpose of prostitution. In this case, the defendant's conduct constitutes lewdness because it occurred in a residential neighborhood and was in furtherance of an act of prostitution. He engaged in the act with a known prostitute in an area reputed for illicit activity, and, while no exchange of money was witnessed, from the totality of the circumstances, a clear inference may be drawn that the sexual act was committed in exchange for monetary compensation. Thus, proof of an actual exchange of money is not required.

MCL 600.3801; MSA 27A.3801 provides for the abatement of a vehicle used for the purpose of lewdness, assignation, or prostitution. A public nuisance has been held to exist where an act offends public decency and involves a continuing detrimental effect on the public. Evidence of the general reputation of a place is admissible for the purpose of proving the existence of a nuisance. This case involves a condition that, on the basis of the record, is a public nuisance in the neighborhood at issue. Vehicles that enter the neighborhood to solicit acts of prostitution are being used for the continuance of this nuisance. The one act of nuisance by the defendant in his vehicle must be viewed in light of the larger and continuing nuisance occurring in the neighborhood. Where testimony surrounding the proof of an incident of prostitution unequivocally establishes that the neighborhood has a reputation for prostitution, the property contributing to the continuance of the nuisance may be abated.

In light of the plain language of the nuisance abatement statute and decisions of the Michigan Supreme Court that have applied it, a co-owner need not consent to or acquiesce in the illegal use of property in order for abatement to be ordered. The statute does not violate the constitution. The trial judge did not abuse his discretion in fashioning an appropriate remedy, abating the vehicle.

Chief Justice CAVANAGH, joined by Justices LEVIN and BRICKLEY, dissenting, stated that the condition of the neighborhood in this case is not the public nuisance. Further, a single act of prohibited conduct is insufficient to support abatement without evidence that the conduct is habitual or continuing. Public nuisances, by their nature, imply a continuing condition. The statute is aimed at property that has become so associated with an activity that it has become part of the activity. In this case, the vehicle abated was only a convenient site for the activity, and the activity was insufficient to subject the vehicle to abatement under the statute.

Justice LEVIN, dissenting, stated that a vehicle is not subject

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to a nuisance abatement action unless the person owning or in lawful possession of it is engaged in and uses it in the conduct of illicit activity, described in the statute, as a business.

The general reputation of a place may be considered for the purpose of showing that the place is a nuisance, and of a vehicle for the purpose of showing that the vehicle is a nuisance. But the general reputation of a place where the vehicle is driven or used, under the statutory provision for use of general reputation evidence, may not be relied on for the purpose of showing that the vehicle is a nuisance.

Unless a vehicle itself is a nuisance, it is not subject to abatement, and it is not within the intendment of the statute. Unless a place itself is a nuisance, i.e., a place used for the purpose of prostitution, or used by or kept for the use of prostitutes, it is not subject to abatement, and it is not within the intendment of the statute. The Legislature clearly did not intend that an entire residential neighborhood where prostitutes roam, as a place, was subject to abatement.

The statutory provision that the prosecutor is not required to offer proof of knowledge of the existence of the nuisance on the part of the defendants or any of them does not make an owner's lack of knowledge immaterial or irrelevant regarding whether property that is subject to abatement as a nuisance should be forfeited. As a matter of statutory construction, an innocent co-owner's share of a vehicle should not be subject to forfeiture.

200 Mich App 670; 504 NW2d 731 (1993) reversed.

Frank J. Kelley, Attorney General, *Thomas L. Casey*, Solicitor General, *John D. O'Hair*, Prosecuting Attorney, *George E. Ward*, Chief Assistant Prosecuting Attorney, *Andrea Solak*, Chief, Special Operations, and *Larry L. Roberts*, Assistant Prosecuting Attorney, for the plaintiff.

ACLU Fund of Michigan (by *Paul J. Denenfeld*) for the defendants.

RILEY, J. In this case, we are required to construe various aspects of the nuisance abatement

statute, MCL 600.3801; MSA 27A.3801.[1] Specifically, we must decide whether an act of prostitution was consummated absent proof that money was exchanged. Next, we must determine whether the trial court erred in abating a vehicle used to commit an act of prostitution in a neighborhood with a reputation for illicit activity. Finally, we must consider whether a co-owner's interest in a vehicle may be abated where the co-owner allegedly had no knowledge that the vehicle was used in proscription of the statute.

We would hold that lewdness, incidental to an act of prostitution, is activity squarely within the purview of the nuisance abatement statute. Alternatively, we conclude that proof of an exchange of money is not necessary where, as here, it is clear from the totality of circumstances that the sexual act was in exchange for payment. Additionally, we would uphold the abatement of this vehicle because the defendant entered a neighborhood that is a known place for prostitution and used his vehicle to engage in illicit activity, thereby contributing to the existing nuisance. Finally, pursu-

[1] Any building, vehicle, boat, aircraft, or place used for the purpose of lewdness, assignation or prostitution or gambling, or used by, or kept for the use of prostitutes or other disorderly persons, or used for the unlawful manufacture, transporting, sale, keeping for sale, bartering, or furnishing of any controlled substance as defined in section 7104 of the public health code, Act No. 368 of the Public Acts of 1978, being section 333.7104 of the Michigan Compiled Laws, or of any vinous, malt, brewed, fermented, spirituous, or intoxicating liquors or any mixed liquors or beverages, any part of which is intoxicating, is declared a nuisance, and the furniture, fixtures, and contents of the building, vehicle, boat, aircraft, or place and all intoxicating liquors therein are also declared a nuisance, and all controlled substances and nuisances shall be enjoined and abated as provided in this act and as provided in the court rules. Any person or his or her servant, agent, or employee who owns, leases, conducts, or maintains any building, vehicle, or place used for any of the purposes or acts set forth in this section is guilty of a nuisance.

ant to the clear and unambiguous language of the statute, we would hold that knowledge or consent is not required to abate the interest of a co-owner.

I

John Bennis was arrested for gross indecency on the evening of October 3, 1988. On that evening, Detroit police officers Jacob Anthony and John Howe set up surveillance after they witnessed a woman "flagging"[2] passing vehicles on the corner of Eight Mile and Sheffield. The woman was later identified as Kathy Polarchio. The officers next observed a 1977 Pontiac, driven by a man, later identified as John Bennis, turn onto Sheffield and stop near Ms. Polarchio, who approached and entered the passenger side of the Pontiac. The officers followed the Bennis vehicle, which proceeded a block, made a U-turn, and stopped. Surveillance continued until the officers noticed Ms. Polarchio's head disappear toward the driver's side of the Pontiac. The officers immediately approached the Bennis vehicle, shined a flashlight into the front seat, and witnessed Ms. Polarchio performing an act of fellatio on Mr. Bennis.

Mr. Bennis was convicted of gross indecency in violation of MCL 750.338b; MSA 28.570(2).[3] The Wayne County prosecutor then filed a complaint alleging that the Bennis vehicle was a public nuisance subject to abatement pursuant to MCL 600.3801; MSA 27A.3801. The vehicle was co-owned by Mr. Bennis' wife, Tina Bennis, who claimed that she had no knowledge that her husband ever used their vehicle in violation of the statute. The trial judge held that the vehicle was a nuisance and abated the interest of defendant and his wife.

[2] "Flagging" is the manner in which prostitutes solicit business from potential customers in passing vehicles.

[3] Ms. Polarchio was arrested the next day for accosting and soliciting. She had formerly been arrested on several occasions for disorderly conduct, accosting and soliciting, and indecent and obscene conduct.

The Court of Appeals reversed the decision of the trial court,[4] holding first that the prosecution had an obligation under *People v Schoonmaker*, 241 Mich 177; 216 NW 456 (1927), to demonstrate that Mr. Bennis' wife knew that he used the vehicle in a manner proscribed by the statute and failed to offer such proof.[5] The Court of Appeals next held that under *State ex rel Oakland Co Prosecutor v Motorama Motel Corp*, 105 Mich App 224; 307 NW2d 349 (1981), proof of a single incident of lewdness, assignation, or prostitution is insufficient to establish a nuisance. Finally, the Court of Appeals held that the prosecution failed to demonstrate that an act of lewdness, assignation, or prostitution occurred.

We granted leave to appeal[6] and now reverse the decision of the Court of Appeals.

II

We turn first to whether the act committed in the Bennis vehicle is within the purview of the nuisance abatement statute. Consistent with the 1909 Iowa "red light abatement acts," upon which the Michigan statute is based,[7] the Michigan statute requires that the act be one of "lewdness, assignation *or* prostitution."[8] In *State ex rel*

[4] 200 Mich App 670; 504 NW2d 731 (1993).

[5] *Schoonmaker* was based on a predecessor statute, 1925 PA 389; however, the relevant language is virtually identical to the present statute. See n 24.

[6] 445 Mich 861 (1994).

[7] *State ex rel Wayne Co Prosecutor v Diversified Theatrical Corp*, 396 Mich 244, 246; 240 NW2d 460 (1976).

[8] See n 1 (emphasis added).

Wayne Co Prosecuting Attorney v Levenburg, 406 Mich 455; 280 NW2d 810 (1979), this Court used the rule of construction, *noscitur a sociis*, to define assignation in the statute.[9] The Court upheld the abatement of a bar because it was used for accosting and soliciting acts of prostitution. In other words, "the making of an appointment for the purpose of prostitution" constituted assignation under the statute. *Id.* at 466. *Levenburg* based its decision on *State ex rel Wayne Co Prosecutor v Diversified Theatrical Corp*, 396 Mich 244, 246-250; 240 NW2d 460 (1976). *Diversified* essentially held that while lewdness, assignation, and prostitution are set forth in the alternative, the conduct constituting lewdness or assignation must be incidental to or in furtherance of an act of prostitution.[10]

In the instant case, the prosecution maintains that an act of lewdness, within the context of the nuisance abatement statute, occurred. Although this aspect of the statute has yet to be defined,[11] we

[9] The doctrine should be applied where legislative intent is not clear, so that "when two or more words are grouped together, and ordinarily have a similar meaning, but are not equally comprehensive, the general word will be limited and qualified by the special word." 2A Singer, Sutherland Statutory Construction (5th ed), § 47.16, p 183. See also *Williams & Works, Inc v Springfield Corp*, 408 Mich 732, 746; 293 NW2d 304 (1980).

[10] *Diversified* relied on *State v Morley*, 63 NM 267, 270-271; 317 P2d 317 (1957), which stated "we are led to believe that the legislature intended 'lewdness' to be limited to acts in connection with 'assignation' or 'prostitution' " and further noted that "[t]he term 'lewdness' is a broader and more general term than 'assignation' or 'prostitution.' " See also *State ex rel Oakland Prosecuting Attorney v Ginell*, 159 Mich App 679, 681; 407 NW2d 59 (1987), in which the Court of Appeals held that the activity must not be consensual in nature, whether lewd, obscene, or disorderly; *State ex rel Wayne Co Prosecuting Attorney v Dixy Duck*, 203 Mich App 250, 260; 511 NW2d 907 (1994), where the Court of Appeals concluded that lewdness "as used in the nuisance abatement statute, refers to those sexual acts . . . performed on another where done for hire."

[11] In *Diversified*, we did not define lewdness, but simply held that no interest was abatable because the conduct was unrelated to live acts of prostitution on the premises.

agree with the contention put forth by the prosecution.

We analogize the definition of "assignation" in *Levenburg* with the definition we now give to "lewdness." *Levenburg* looked to the common meaning of "assignation" and concluded that the common definition of the term is limited to those instances in which the act of assignation is "for the purpose of prostitution." *Id.* at 466. In this manner, the common definition of "lewdness" includes a lustful and obscene display of illicit sexual activity.[12] Utilizing the common meaning of "lewdness,"[13] we also conclude that it is limited to those instances in which an act of lewdness occurs in furtherance of or for the purpose of prostitution.

This result is consistent with Michigan decisions in *Diversified* and *Levenburg, supra*, as well as other jurisdictions interpreting similar language.[14] For example, in *Pennsylvania v MacDonald*, 464 Pa 435, 460-461; 347 A2d 290 (1975), the court addressed the issue of lewdness and concluded:

[12] See also 50 Am Jur 2d, Lewdness, Indecency, Etc, § 1, pp 450-451:

> Lewdness has been defined as the unlawful indulgence of lust. It signifies that form of immorality which has relation to sexual impurity, and is generally used to indicate gross indecency with respect to the sexual relations. Illicit intercourse may under some circumstances constitute lewdness, but there may also be lewdness without any such act.

[13] The *Random House College Dictionary of the English Language: Unabridged Edition* defines "lewd" as:

> 1. inclined to, characterised by, or inciting to lust or lechery; lascivious. 2. obscene or indecent, as language or songs; salacious. 3. Obs. a. low, ignorant, or vulgar. b. base, vile, or wicked, esp. of a person. c. bad, worthless or poor, esp. of a thing.

[14] See *Levenburg* and *Diversified* and cases cited therein.

> Far more important than mere dictionary definitions is the statutory context in which the word "lewdness" appears. That context proscribes use of any building "for the purpose of fornication, . . . assignation, and/or prostitution." All of these forbidden purposes involve illicit sexual *conduct*, thus strongly indicating a legislative intention to proscribe only purposes of this type when it used the word "lewdness." Such a construction has the further advantage of obviating any problems of vagueness which might be entailed by construing the term "lewdness" in a broader fashion. [Emphasis supplied.]

In the case at bar, Mr. Bennis' conduct constitutes lewdness because it occurred in a residential neighborhood and was in furtherance of an act that traditionally forms the basis of a prostitution charge, i.e., fellatio.[15] This result is consistent with the definition of assignation in *Levenburg, supra* at 466. Indeed, we find particularly persuasive the fact that Mr. Bennis engaged in this act with a known prostitute in an area reputed for illicit activity.[16] Therefore, while no money was exchanged, the conduct clearly satisfies statutory requirements and is subject to abatement.

Moreover, even if we did not find the conduct lewd within the meaning of the nuisance abatement statute, we are persuaded that from the totality of the circumstances, an act of prostitution occurred. We primarily rely on the uncontroverted testimony of Detroit police officer Jacob Anthony who, along with his partner, witnessed Ms. Polar-

[15] We do not decide whether property may be abated for an act of lewdness where the conduct is not that which traditionally forms a charge of prostitution.

[16] The record is devoid of any evidence that Mr. Bennis raised in his defense that this activity was consensual or that he and Ms. Polarchio had some prior relationship.

chio "flagging"[17] passing vehicles on Eight Mile and Sheffield. His testimony is a compelling indication that an act of prostitution occurred. As previously stated, the officers witnessed the Bennis vehicle stop in response to Ms. Polarchio's "flagging" and saw her enter the vehicle posthaste. The vehicle proceeded and within minutes again came to a stop. Ms. Polarchio's head immediately disappeared, and the officers then observed the two engaged in fellatio. The dissent fails to address this most persuasive testimony.

We are additionally persuaded by the following facts which support our conclusion. One witness, Sammie Parham, a security guard at a business located at Six Mile and Woodward, testified that he had seen Mr. Bennis in the area during the summer before Bennis' October 3, 1988, arrest. Mr. Parham saw Mr. Bennis talking to a prostitute on two separate occasions and ushered the prostitutes away in both instances just as they were about to enter the Bennis vehicle.

Furthermore, it is uncontested that Ms. Polarchio had been arrested several times for solicitation and disorderly conduct. The arresting officer testified that Mr. Bennis stopped at the waving, or what he perceived to be the "flagging," by Ms. Polarchio. Additionally, we are persuaded by Mr. Bennis' admission at trial that he normally proceeds home across Eight Mile and turns north onto Woodward. It is uncontested that on the evening in question, Mr. Bennis drove down Eight Mile and proceeded *south* on Sheffield, the opposite direction of his home. It is also undisputed that minutes after he turned onto Sheffield and picked up Ms. Polarchio, two officers found them engaged in fellatio.

[17] See n 2.

While the officers did not actually witness an exchange of money, from the testimony elicited at trial, a clear inference may be drawn that the sexual act was in exchange for monetary compensation. In his defense, Mr. Bennis has not asserted that he and Ms. Polarchio had a relationship or even knew one another, precluding any inference that the act was consensual, rather than for hire. We do not shift the burden of proof to defendant on this issue. We clearly have sufficient testimony on the record which supports that an act of prostitution occurred. We merely find it noteworthy that, as a matter of fact, Mr. Bennis has not asserted in his defense that there was a prior or existing relationship between himself and Ms. Polarchio.

In sum, we are persuaded by the testimony of the officer witnessing the act and the stated additional facts that augment our decision. Under these circumstances, proof of an actual exchange of money is not required. An action will not be denied merely because the witnessing officers do not allow the illicit activity to proceed to the point where money is exchanged. We therefore conclude that the Court of Appeals erred in holding that the prosecution failed to demonstrate that an act of lewdness, assignation, or prostitution occurred in the Bennis vehicle.

III

As noted above, MCL 600.3801; MSA 27A.3801 provides for the abatement of a vehicle used for the purpose of lewdness, assignation, or prostitution. However, the statute does not define the extent of activity required to constitute a nuisance. Therefore, we must next determine whether *an* act of prostitution committed in a neighborhood

known for illicit activity is within the purview of the statute.

A

Although the issue has not been resolved by appellate decisions of this state, an attempt was made to clarify the definition of nuisance in *Motorama Motel, supra*. Citing *People ex rel Wayne Prosecuting Attorney v Bitonti*, 306 Mich 115; 10 NW2d 329 (1943), *Motorama* held that "[a] nuisance involves the notion of repeated or continuing conduct and should not be based upon proof of a single isolated incident unless the facts surrounding that incident permit the reasonable inference that the prohibited conduct was habitual in nature." *Id.* at 229-230. However, *Motorama*'s reliance on *Bitonti* is belied by the fact that only four of the eight justices in *Bitonti* held that a single act was sufficient to constitute an abatable nuisance.[18]

As a result, existing Michigan precedent does not specifically require more than a single incident of conduct. However, cognizant of the activity that has implicitly constituted a nuisance in previous actions,[19] we must determine whether the activity

[18] Four justices held that a single act was sufficient, three held it was not, and one concurred in the reversal of the abatement but "without expressing the opinion that proof of a single violation would be insufficient to establish the existence of a nuisance under all circumstances." *Id.* at 120.

[19] We acknowledge that many abatement cases in this state based on identical predecessor statutes involved a nuisance where more than a single act of conduct was proved or could be inferred. *People ex rel Wayne Prosecuting Attorney v Sill*, 310 Mich 570, 572; 17 NW2d 756 (1945), abated the interest of a vehicle where proof was submitted that the owner was engaged in the "numbers racket" and had in his possession a number of betting slips. *State ex rel Wayne Prosecuting Attorney v Martin*, 314 Mich 317, 322; 22 NW2d 381 (1946), held that "[t]he testimony of defendant would of itself be a sufficient basis for the court's finding that defendant had used the

in this case properly falls within the definition of nuisance as used in MCL 600.3801; MSA 27A.3801.

B

Because the public nuisance statute allows the abatement of property used in a proscribed manner without specifying the activity that will constitute a nuisance, we are aided in the definition of a nuisance by general public nuisance law. This Court has defined a public nuisance as involving "not only a defect, but threatening or impending danger to the public . . . ." *Kilts v Kent Co Bd of Supervisors*, 162 Mich 646, 651; 127 NW 821 (1910). Similarly, this Court has declared a public nuisance where an act "offends public decency." *Bloss v Paris Twp*, 380 Mich 466, 470; 157 NW2d 260 (1968).[**] Finally, *Garfield Twp v Young*, 348 Mich 337, 342; 82 NW2d 876 (1957), held that to constitute a nuisance

> the activity must be harmful to the public health, or create an interference in the use of a way of

automobile in question on the very day of his arrest and the preceding day for the illegal purposes [gambling] claimed by plaintiff" and therefore was abatable pursuant to the nuisance abatement statute. *Levenburg*, *supra* at 466-467, upheld the abatement of a Detroit bar where there was testimony that prostitutes frequently solicited customers to perform sexual acts elsewhere. In *State ex rel Macomb Co Prosecuting Attorney v Mesk*, 123 Mich App 111, 123; 333 NW2d 184 (1983), the Court relied on *Motorama*, requiring that the prosecution establish that the nuisance was continuing in nature. A continuing nuisance was established where four undercover police officers made separate visits to a massage parlor over a nine-month period and each time a model agreed to perform sexual services.

[**] In *Bloss*, *supra*, this Court upheld the lower court's injunction of the operation of an outdoor theater showing explicit movies where neighborhood children could view the films from outside the drive-in. *Id.* at 468-469. The Court held: "It is our judgment that the foisting off of a display of pictures not fit for children to see onto places within their view on public streets, on residential properties and in private homes, without the consent of the property owners and the parents, is a public nuisance." *Id.* at 470.

> travel, or affect public morals, or prevent the public from the peaceful use of their land and the public streets. [Citations omitted.]

The rationale is that a nuisance involves a continuing detrimental effect on the public. The nuisance abatement statute serves the same general purpose. Therefore, mindful of the activity that generally constitutes a public nuisance, we apply these principles to the context of the nuisance abatement statute.

C

In construing the nuisance abatement statute, "effect must be given, if possible, to every word, sentence and section." *Grand Rapids v Crocker*, 219 Mich 178, 182; 189 NW 221 (1922). Moreover, to discover the legislative intent, "the entire act must be read, and the interpretation to be given to a particular word in one section arrived at after due consideration of every other section so as to produce, if possible, a harmonious and consistent enactment as a whole." *Id.* at 182-183. However,

> [w]here the language of a statute is of doubtful meaning, a court must look to the object of the statute in light of the harm it is designed to remedy, and strive to apply a reasonable construction that will best accomplish the Legislature's purpose. [*Marquis v Hartford Accident & Indemnity*, 444 Mich 638, 644; 513 NW2d 799 (1994). Citations omitted.]

Pursuant to these rules of construction, we consider MCL 600.3815; MSA 27A.3815 in our analysis of whether an abatable nuisance exists. The section provides:

> In any action brought under this chapter, evi-

dence of the general reputation of the building, vehicle, boat, aircraft *or* place is admissible for the purpose of proving the existence of the nuisance. [Emphasis added.]

The nuisance abatement statute's use of the disjunctive "or" allows us to consider the reputation of the vehicle *or* the place to determine whether a nuisance exists. The *Random House College Dictionary* defines "place" as "an open space, or square, in a city or town," "a short street, court," and "an area of habitation, as a city, town, or village." Given the unique facts in this case, we focus on the word "place" set forth in MCL 600.3815(1); MSA 27A.3815(1). We conclude that the word "place" may encompass a neighborhood, and we therefore consider the general reputation of the area surrounding the Eight Mile and Sheffield intersection for purposes of determining the existence of a nuisance.[21]

Several members of that neighborhood testified about numerous incidents where they had personally been accosted and solicited. The arresting officer confirmed that many arrests for prostitution were made in that neighborhood. Several neighbors testified that they had been solicited on more than one occasion. One witness testified that he had observed acts of prostitution near the corner of Eight Mile and Gardendale and that on one occasion he found his young son staring at strange vehicles parked near that corner in which men

[21] See *State ex rel Wayne Co Prosecuting Attorney v Bernstein*, 57 Mich App 204, 206; 226 NW2d 56 (1974), upholding the abatement of a bar under MCL 600.3801; MSA 27A.3801 where "officers testified to numerous arrests for accosting and soliciting, and to the general reputation of the Vernor Bar as a place where the services of a prostitute can easily be obtained." See also *People v Lee*, 307 Mich 743, 753; 12 NW2d 418 (1943), upholding admission of testimony of three witnesses about the "general reputation in the vicinity" of a house of prostitution in an action to convict the owner of the house.

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and women were apparently committing acts of prostitution. These incidents reflect concerns identical to those cited in *Garfield* and *Bloss*, *supra*.

Thus, the present case involves a condition that, on the basis of the record below, is a public nuisance in this neighborhood. It cannot be contested that a significant threat to public peace and safety exists in the Eight Mile and Sheffield neighborhood. Vehicles that enter the neighborhood in order to solicit acts of prostitution are being "used for" the continuance of this nuisance. Therefore, we would hold that the nuisance abatement statute allows the abatement of a vehicle where the driver entered into and thereby contributed to an existing condition that is a public nuisance.[22]

D

This remedy is also buttressed by our review of the overall objective of the nuisance abatement statute. We note that in 1988, minor changes were made to the statute.[23] It appears clear from the amendment that the Legislature intended to remedy the inevitable decline of vice-laden neighborhoods. In the amendment, references to "narcotic and/or hypnotic drug" were changed to the broader and more encompassing phrase, "controlled substance." The arguments presented in support of the amendment stated: "Dope houses are a plague upon the city neighborhoods in which they occur. Drug trafficking, violent crime, and theft endanger and disrupt the lives of law-abiding

[22] We note that our position is limited to situations in which a nuisance condition exists, regardless of the city. Therefore, a vehicle could not be abated if the same situation arose in another area of Detroit, such as Palmer Woods, where certainly no such nuisance condition exists.

[23] The 1988 amendment was in effect when the act occurred in the Bennis vehicle.

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citizens. The appearance of dope houses can put an entire neighborhood into decline."[34]

The legislative objective was also addressed in *People ex rel Wayne Prosecuting Attorney v Sill*, 310 Mich 570; 17 NW2d 756 (1945). In *Sill*, this Court held that the purpose of the nuisance abatement statute[35] was "to eliminate effectively, by statutory procedure, the use of property, real or *personal*, in connection with gambling, *prostitution*, and illicit sale of liquor . . . ." *Id.* at 575 (emphasis added). Similarly, *State ex rel Wayne Co Prosecuting Attorney v Bernstein*, 57 Mich App 204, 208; 226 NW2d 56 (1974), held that "[t]he padlock law is designed to facilitate the elimination of certain situations which have been found to interfere with a substantial community interest." Thus, we believe that our position is consistent with the intent of the Legislature.

E

Moreover, the holding in *State ex rel Attorney*

[34] House Legislative Analysis, HB 4317, May 13, 1987.

[35] The present statute is almost identical to its predecessor on which the *Sill* case is based. The statute read as follows:

> Any building, vehicle or place used for the purpose of lewdness, assignation or prostitution or gambling, or used by, or kept for the use of prostitutes or other disorderly persons, or used for the unlawful manufacture, storing, possessing, transporting, sale, keeping for sale, giving away, bartering, furnishing or otherwise disposing of any vinous, malt, brewed, fermented, spirituous or intoxicating liquors or any mixed liquors or beverages, any part of which is intoxicating, is hereby declared a nuisance and the furniture, fixtures and contents of any such building, vehicle or place, and all such intoxicating liquors therein are also declared a nuisance, and all such nuisances shall be enjoined and abated as hereinafter provided. Any person, or his servant, agent or employe who shall own, lease, conduct or maintain any building, vehicle or place used for any of the purposes or by any of the persons above set forth or where any of the acts above enumerated are conducted, permitted or carried on, is guilty of a nuisance. [1929 CL 9093. Cf. n 1.]

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General v Robinson, 250 Mich 99; 229 NW 403 (1930), is analogous to our position in the present case and conclusively persuades us that we have achieved a remedy consistent with the legislative intent. In *Robinson*, one apartment in a fifty-unit building was abated where proof of a *single* incident of prostitution was submitted. A police officer witnessed a solicitation by a prostitute and the entry of the apartment to commit the act. Although there was proof of only one act of prostitution in the abated apartment, this Court considered the general reputation of the building and the fact that the woman pleaded guilty to charges of prostitution and concluded that "the nuisance use of the premises . . . can be found without drawing on the imagination." *Id.* at 104.

The dissent maintains that reliance on *Robinson* is misplaced. The dissent's recitation of the facts of *Robinson*, however, only confirms that it is persuasive authority for the proposition that a single act sufficiently constitutes a nuisance where a larger nuisance condition exists. The dissent correctly states: "A police officer witnessed a solicitation outside the building, watched two persons go into the building, and arrested the pair when they came out of the building." *Post*, p 746 (emphasis added). It is vital to note that ultimately the only apartment abated was the one in which a single act of prostituion occurred. Further, it was only abated after consideration of the reputation of the larger nuisance condition existing in the building itself, which could not be abated in that case.

As previously stated, the nuisance abatement statute has remained virtually unchanged since *Robinson*, and our position therefore would apply a priori to the present case. The one act of prostitution in *Robinson* was considered with regard to

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the general reputation of the entire building. Similarly, the one act of nuisance by Mr. Bennis in his vehicle must be viewed in light of the larger and continuing nuisance occurring in the neighborhood. Where testimony surrounding proof of an incident of prostitution unequivocally establishes that the neighborhood has a reputation for prostitution, the property contributing to the continuance of the nuisance may be abated pursuant to the statute. To hold otherwise would allow the criminal actors to circumvent the statute where a different vehicle was used in the commission of each offense. The result would permit the continuing blight of neighborhoods, contrary to the clear intent of the statute. Accordingly, we would hold that the Court of Appeals erred in concluding that the act of prostitution occurring in the Bennis vehicle in a neighborhood known for prostitution was not an abatable nuisance.

IV

Finally, we consider whether a co-owner's interest in a vehicle may be abated where the co-owner had no knowledge that the vehicle was used in a manner proscribed by the nuisance abatement statute. Despite the clear and unambiguous language of the statute indicating that a property owner's knowledge or consent is not required,[26] decisions of this state have nonetheless reached different conclusions with respect to this issue. We would resolve the conflict and would hold that knowledge is not required.

[26] "Proof of knowledge of the existence of the nuisance on the part of the defendants or any of them, is not required." MCL 600.3815(2); MSA 27A.3815(2). The language is nearly identical to the original language of the public nuisance statute: "Proof of knowledge of the existence of such nuisance on the part of the defendants or any of them, shall not be required." 1925 PA 389, § 9.

A

The schism has its underpinnings in *Schoonmaker, supra,* a pre-1988 case. *Schoonmaker* seemingly required proof of an owner's consent to the illegal use of the property to be abated. The clear language of the nuisance abatement statute abrogates the requirement of knowledge.[27] In *Schoonmaker,* certain illegal acts were committed by people attending a dance hall. However, those acts were not committed inside the dance hall; instead, patrons consumed intoxicating liquor outside the hall. In this manner, all proscribed activity was divorced from the property sought to be abated. The property itself was not in any way used to facilitate the proscribed act, unlike the set of facts before us.

On the basis of these facts, it appears that Justice WIEST in *Schoonmaker* did not intend a result inconsistent with the nuisance abatement statute. Additionally, it is apparent that Justice WIEST did not intend to contradict the provision of the abatement statute because only three years later in *Robinson, supra* at 103, Chief Justice WIEST concluded that the statute "expressly obviates need of knowledge on the part of the owner of nuisance use of his premises."

Schoonmaker, however, begat confusion regarding the statutory requirement of knowledge. Subsequent cases have ruled consistently with the result that an owner's knowledge is not required. *Bitonti, supra,* and *People ex rel Wayne Prosecuting Attorney v Tate,* 306 Mich 667; 11 NW2d 282 (1943), involved the abatement of a motor vehicle illegally used for gambling. Both cases relied on the statute, holding that an owner's knowledge is

[27] See n 26.

not required.[28] However, several other cases apparently read *Schoonmaker* to require the owner's knowledge.[29] In light of the plain language of the nuisance abatement statute and the Michigan Supreme Court decisions in *Robinson, Bitonti,* and *Tate,* we would hold that the statute expressly obviates the requirement that an owner consent to or acquiesce in the illegal use of property.[30] We likewise would hold that *Schoonmaker* is distinguishable because in that case "[i]ntoxicating liquor was not used in the dance hall but secreted by patrons outside of the hall and secretly visited. *Id.* at 182.[31]

B

Finally, therefore, we consider the constitutional

[28] Also, in *State ex rel Oakland Prosecuting Attorney v Weaver,* 74 Mich App 462, 464; 254 NW2d 68 (1977), the Court of Appeals again considered the knowledge requirement of the nuisance statute and concluded: "Considering the clear language of the statute, we are convinced that *Robinson, Bitonti* and *Tate* are correct."

[29] In *State ex rel Wayne Prosecuting Attorney v Weitzman,* 21 Mich App 705, 711; 176 NW2d 463 (1970), the Court held that an owner must have knowledge of acts of prostitution before padlocking the premises. *Weitzman* acknowledged *Robinson* and its progeny, but chose the course initiated by *Schoonmaker. Id.* Likewise, in *Motorama, supra* at 228, the Court of Appeals returned to the *Schoonmaker* decision, after *Weaver,* n 28 *supra* stating that it had never been formally overruled. *Motorama* also cited dicta from *Levenburg, supra,* supporting its decision requiring an owner's knowledge:

> [W]e acknowledge that a judgment for abatement in a prosecution of this nature cannot be rendered without a finding of knowledge of the accosting and soliciting on the part of the owners or operators of the place found to be a nuisance and their acquiescence in those activities. [*Id.* at 462, n 1.]

[30] As explained in *McKibbin v Corp & Securities Comm,* 369 Mich 69, 81; 119 NW2d 557 (1963), "[w]e have no other duty to perform than to construe the legislative will as we find it, without regard to our own views as to the wisdom or justice of the act."

[31] To the extent the reasoning of *Schoonmaker* may be read to imply that an owner must know that the property is being used in proscription of the statute, we choose not to follow it.

significance of the abatement of Mrs. Bennis' interest in the vehicle. We assume, arguendo, that Mrs. Bennis did not have knowledge of or consent to the misuse of the Bennis vehicle, of which she was co-title owner. Historically, consideration was not given to the innocence of an owner because the property subject to forfeiture was the evil sought to be remedied.[32] As recently as the landmark forfeiture case, *Calero-Toledo v Pearson Yacht Leasing Co,* 416 US 663, 683; 94 S Ct 2080; 40 L Ed 2d 452 (1974), the United States Supreme Court has reflected this view: "the innocence of the owner of property subject to forfeiture has almost uniformly been rejected as a defense."

In *Van Oster v Kansas,* 272 US 465, 467; 47 S Ct 133; 71 L Ed 354 (1926), the Supreme Court upheld the forfeiture and sale of an automobile used to transport liquor as proscribed by a Kansas statute. In declaring the vehicle a common nuisance, the Court rejected the innocent owner's Fourteenth Amendment due process claim because "the offense of unlawful transportation was committed by one entrusted by the owner with the possession and use of the offending vehicle."

In *Calero, supra,* the Supreme Court forfeited a lessor's interest in a yacht used to transport marijuana. The lessor had no knowledge that the yacht

[32] See, e.g., *The Palmyra,* 25 US (12 Wheat) 1, 14; 6 L Ed 31 (1827), in which Justice Story held that "[t]he thing is here primarily considered as the offender, or rather the offence is attached primarily to the thing . . . ." In *United States v The Little Charles,* 26 F Cas 979, 982; 1 Brock 347 (CC D Va, 1818) (No. 15,612), Chief Justice Marshall held that the proceeding was "against the vessel, for an offence committed by the vessel, which is not less an offence, and does not the less subject her to forfeiture, because it was committed without the authority, and against the will of the owner." *Dobbins' Distillery v United States,* 96 US 395, 400; 24 L Ed 637 (1877), stated that "[b]eyond all doubt, the act of Congress in question attaches the offence to the distillery, and the real and personal property connected with the same . . . ." *Harmony v United States,* 43 US (2 How) 210, 238; 11 L Ed 239 (1844).

was used illegally.[33] Consistent with *Van Oster, supra*, the Court stated that it "has been implied that it would be difficult to reject the constitutional claim of an owner whose property subjected to forfeiture had been taken from him without his privity or consent." *Calero, supra* at 689. *Calero* went further and stated in dicta that "the same might be said of an owner who proved not only that he was uninvolved in and unaware of the wrongful activity, but also that he had done all that reasonably could be expected to prevent the proscribed use of his property . . . ." *Id.*

Applying the principles of *Van Oster* and *Calero*, it is evident that Mrs. Bennis' claim is without constitutional consequence. Mrs. Bennis was a joint owner who explicitly or implicitly *entrusted* Mr. Bennis with the use and possession of their vehicle. *Van Oster, supra.* It is clear from *Calero* that the abatement of property stolen from the owner or taken without the owner's knowledge would be prohibited. However, on the basis of the facts before us, the argument cannot be made that the vehicle was stolen or initially driven without Mrs. Bennis' knowledge.

Moreover, in the Michigan forfeiture case, *People v One 1979 Honda Automobile*, 139 Mich App 651, 655-656; 362 NW2d 860 (1984), the Court of Appeals held that knowledge by one co-owner of the illegal activity was sufficient to forfeit the

[33] The Court ultimately held that the boat subject to forfeiture was voluntarily entrusted to a lessee who illegally used it and that, because there was no allegation or proof that the innocent lessor "did all that it reasonably could to avoid having its property put to an unlawful use," forfeiture was appropriate, despite the company's lack of knowledge. *Id.* at 690. The Court further stated that the contested forfeiture statutes "further the punitive and deterrent purposes that have been found sufficient to uphold, against constitutional challenge, the application of other forfeiture statutes to the property of innocents." *Id.* at 686.

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interest of both owners. The car was forfeited[34] in that case even though one of the titled owners had no knowledge of the illegal activities committed within the car. *Id.* The unconstitutionality of the forfeiture was not even considered.[35]

Having concluded that the abatement of the Bennis vehicle is not constitutionally infirm, we address the dissent's contention that "the trial court has broad discretion to fashion an appropriate remedy." *Post*, p 753. It is not contested that this is an equitable action. That being the case, it is critical to recognize that the trial judge considered alternatives on the record and, in the exercise of his discretion, fashioned an appropriate remedy, abating the entire interest in the vehicle. We merely sanction the trial judge's action, which is clearly permitted under the nuisance abatement statute, and find that such action was not an abuse of discretion.

Review of the controlling cases persuades us that no constitutional violation results from the abatement of Mrs. Bennis' interest in the vehicle. The United States Supreme Court indisputably allows forfeiture of an innocent owner's property, unless evidence was submitted that the property was stolen or used without the consent of the owner.[36] *Van Oster; Calero, supra.* Other jurisdic-

[34] The car was used to facilitate an illegal drug transaction.

[35] See also *In re Forfeiture of $53*, 178 Mich App 480, 495; 444 NW2d 182 (1989), in which the Court again considered the issue and this time determined that the forfeiture statute "was intended to establish a separate defense for *each* claimant who has a personal interest in the property as an owner." Although the Court did not forfeit the interest of the innocent owner, the decision was based on statutory construction, not a constitutional violation.

[36] We note the distinction between the situation in which a vehicle is used without the owner's consent and, although the owner consented to the use, it is used in a *manner* to which the owner did not consent. In the former, the innocent owner's interest could not be abated. *Van Oster; Calero, supra.* In the latter, as in the present case, the innocent owner's interest may be abated.

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tions addressing the issue have allowed the abatement of a co-owner's interest on strikingly similar facts." The Michigan nuisance abatement statute specifically obviates the requirement of proof, and because the statute does not violate the constitution, the Court of Appeals incorrectly held that proof of knowledge of the proscribed activity is required. Additionally, we do not find that the trial judge abused his discretion in fashioning an appropriate remedy, abating the entire interest of the vehicle.

V

In summary, we would hold that an act of lewdness as defined herein occurred and made the vehicle abatable. Moreover, reviewing the entire record, we find that an act of fellatio occurred so as to create a clear inference that it was for monetary compensation. Proof of an actual exchange of the money is not required by the statute or decisions of this Court. Thus, alternatively, we would hold that a complete act of prostitution occurred in the Bennis vehicle. Additionally, because the act occurred in a neighborhood that was a place reputed for prostitution and therefore a public nuisance, Mr. Bennis' vehicle contributed to

[37] Similarly, in *People v Garner*, 732 P2d 1194, 1196 (Colo, 1987), the Colorado Supreme Court held that the entire ownership of an abated vehicle *could not* be vested in the innocent co-owner wife. The court stated that the district court had "inherent equitable authority" to allocate a portion of the proceeds after costs to the innocent owner. Under the statute, however, the court *was not* obliged to do so. Further, in any event, the court could not award the innocent co-owner wife full ownership of the vehicle.

In *In re 1976 Blue Ford Pickup*, 120 Ariz 432, 435; 586 P2d 993 (Ariz App, 1978), the Arizona Court of Appeals upheld forfeiture of a truck jointly owned by a mother and son where the mother had no knowledge of the prohibited use of the truck. The son's illegal possession of marijuana subjected the truck to forfeiture, and the mother's status as an innocent owner could not "salvage the vehicle from the forfeiture occasioned through the activities of the joint owner."

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that continuing nuisance and may be abated. Finally, we would hold that the clear and unambiguous language of the Michigan nuisance statute obviates the requirement of an owner's knowledge of the proscribed activity and that the statute unquestionably passes constitutional muster. For all of the foregoing reasons, we would reverse the decision of the Court of Appeals.

BOYLE and MALLETT, JJ., concurred with RILEY, J.

GRIFFIN, J., concurred only in the result.

CAVANAGH, C.J. (*dissenting*). As Mr. Rogers would say, "It's a wonderful day in the neighborhood." In this public nuisance abatement case, the focus should be clear: Was the defendants' vehicle an abatable public nuisance? I cannot agree with the lead opinion's mystical concept that under the statute we can call the *condition* of an entire neighborhood a public nuisance. Nor can I agree with its invention that any vehicle contributing to this condition can be abated.

I remain unconvinced that the conduct at issue in the instant case comes within the scope of the public nuisance abatement statute. Assuming arguendo that it does, I do not believe that a single incident, absent circumstances giving rise to a reasonable inference of habitual and continuing nuisance activity, is sufficient to support abatement. Therefore I dissent.

I. THE SINGLE INSTANCE OF ACTIVITY ISSUE

Assuming arguendo that the conduct did fall within the scope of the public nuisance abatement statute, the issue becomes whether a single in-

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stance of that conduct establishes an abatable public nuisance.

The lead opinion states:

> [W]e must next determine whether an act of prostitution committed in a neighborhood known for illicit activity is within the purview of the statute. [*Ante*, pp 729–730.]

There are serious flaws with the mystical concept that follows. The lead opinion examines the *evidentiary* provision of the statute and finds the word "place." Yet, "place" is already used in the statutory provision that defines an abatable public nuisance, i.e., § 3801: "Any building, vehicle, boat, aircraft, or place . . . ." MCL 600.3801; MSA 27A.3801.

The lead opinion reasons:

> The nuisance abatement statute's use of the disjunctive "or" allows us to consider the reputation of the vehicle *or* the place to determine whether a nuisance exists. [*Ante*, p 733.]

The lead opinion then relies on the dictionary definition of "place" to reach "neighborhood." Relying on testimony about prostitutes in the neighborhood, the lead opinion concludes that this "condition" of the *neighborhood* is a public nuisance.

Note, the lead opinion would not hold that the *vehicle* is the nuisance. It cites *People ex rel Wayne Co Prosecutor v Sill*, 310 Mich 570; 17 NW2d 756 (1945), as support. In *Sill*, the *car* that was used for gambling purposes was declared the nuisance. *Id.* at 572. It also cites *State ex rel Wayne Co Prosecuting Attorney v Bernstein*, 57 Mich App 204; 226 NW2d 56 (1974). In *Bernstein*, the *bar* where the prostitutes were soliciting was declared the nuisance. *Id.* at 205. It also relies on

State ex rel Attorney General v Robinson, 250 Mich 99; 229 NW 403 (1930). There, the *apartment* where the act of prostitution occurred was declared the nuisance. *Id.* at 104. None of these cases supports the holding that the condition is the nuisance.

The lead opinion addresses the single incident issue in one short passage. It relies on *State ex rel Attorney General v Robinson, supra*.

In *Robinson*, the defendant's building contained fifty apartments. The building had a reputation for prostitution. A police officer witnessed a solicitation outside the building, watched two persons into the building, and arrested the pair when they came out of the building. The woman told the officer that they had used apartment 404. The trial court abated twenty-two of the apartments. This Court reversed the abatement order with respect to twenty-one of the apartments on the basis of the statutory provision that the nuisance activity must have occurred within thirty days of filing the complaint. *Id.* at 103. Since only the particular incident in apartment 404 had occurred within the thirty days preceding the filing of the complaint, the Court found that abatement of the other twenty-one apartments was improper. However, it abated apartment 404 on the basis of the incident observed by the police officer and because the Court found that the activity in that apartment was *not* an isolated event on the basis of the reputation of the building. *Id.* at 103-104.

Robinson is clearly distinguishable. The apartment was a permanent part of the building. Therefore, the reputation of the building is logically relevant to a permanent part of the building. Contrary to the statement of the lead opinion that the building in *Robinson* could not be abated, the *Robinson* Court stated that "if the apartment was

not identified, then the whole house might be closed." *Id.* at 104. Conversely, the vehicle in the instant case was not a permanent part of the "condition," as the lead opinion defines it. Furthermore, because the proper focus in this case is on the vehicle that the plaintiff sought to abate, the reputation of the area is not relevant to whether this particular vehicle is a public nuisance where the vehicle was not permanently connected to the area. Additionally, there is no evidence that continuing nuisance activity was occurring in *this* vehicle.

In the instant case, the lead opinion would hold:

> Where testimony surrounding proof of an incident of prostitution unequivocally establishes that the neighborhood has a reputation for prostitution, the property contributing to the continuance of the nuisance may be abated pursuant to the statute. [*Ante*, p 737.]

The subject of the holding, "property contributing to the continuance of the nuisance," is far too broad and unlimited in scope.

The prosecutor brought this action to abate the defendants' *vehicle*. The public nuisance abatement statute provides:

> Any . . . vehicle, . . . used for the purpose of lewdness, assignation or prostitution . . . , is declared a nuisance, . . . and all . . . nuisances shall be enjoined and abated as provided in this act and as provided in the court rules. [MCL 600.3801; MSA 27A.3801.]

The prosecution established only *one* incident of sexual activity involving *this* vehicle. Further, there was no evidence to create a reasonable inference that the sexual activity in *this* vehicle was habitual or continuing.

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The Court of Appeals majority followed the approach taken in *State ex rel Oakland Co Prosecutor v Motorama Motel Corp*, 105 Mich App 224; 307 NW2d 349 (1981), to find that a single incident of lewdness was not sufficient. The *Bennis* majority reasoned:

> The *Motorama* approach best effectuates the purpose of the statute. The abatement statute was enacted to subject houses of prostitution to abatement as nuisances. *State ex rel Wayne Co Prosecutor v Diversified Theatrical Corp*, 396 Mich 244, 246-250; 240 NW2d 460 (1976). The purpose of the act has also been described as eliminating the use of property in connection with gambling, prostitution, and the illicit sale of liquor. *People ex rel Wayne Prosecuting Attorney v Sill*, 310 Mich 570, 575; 17 NW2d 756 (1945); *State ex rel Oakland Prosecuting Attorney v Ginell*, 159 Mich App 679, 681-682; 407 NW2d 59 (1987). The statute is not intended to regulate the morality of individuals, or to prevent incidents of immorality in, for example, hotels that are otherwise respectable establishments. See *Diversified Theatrical Corp, supra*, 247.
>
> As in *Motorama*, we hold that a single incident is insufficient to establish a nuisance. Further, the circumstances of this case do not permit a reasonable inference that the conduct was habitual. In this case, the prosecution has alleged only a single incident to support the contention that defendants' car was a nuisance. While the prosecution discusses at length the reputation and record of . . . the woman found in the car with Mr. Bennis, this does not establish that defendants' car was used on more than that occasion for lewdness, assignation, or prostitution. Similarly, testimony was presented that Mr. Bennis was seen on more than one occasion driving in that area and talking to women. Not only does this observed conduct not prove that defendant was involved in lewdness, assignation, or prostitution, there was no evidence to establish that this conduct, if it occurred, took

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> place in the vehicle in question. In fact, defendants allegedly purchased the car only three weeks before the incident that gave rise to this action. [200 Mich App 675-676.]

In *Motorama*,[1] the panel stated that "[a] nuisance involves the notion of repeated or continuing conduct and should not be based upon proof of a single isolated incident unless the facts surrounding that incident permit the reasonable inference that the prohibited conduct was habitual in nature." *Motorama* at 229-230, citing *People v Bitonti*, 306 Mich 115, 119-120; 10 NW2d 329 (1943).

I would continue this limitation.[2] The New York Court of Appeals similarly follows this approach:

> [W]e do not hold, that any premises on which an isolated act of lewdness, assignation or prostitution occurs is subject to the remedies of [the houses of prostitution abatement statute]. Rather, we agree . . . that "the People will have to show a *consistent pattern* of conduct sufficient to prove that the premises are being employed for a proscribed use." The most significant factors in mak-

[1] In *Motorama*, the defendant's hotel was across the street from a bar that was frequented by persons engaged in prostitution. The Court held that the single incident at the hotel was insufficient to support abatement of a nuisance.

[2] See 58 Am Jur 2d, Nuisances, § 77, p 730:

> Nuisance, as a general rule, involves the idea of continuity or recurrence; the maintenance of a nuisance ordinarily implies a continuity of action over a substantial period of time, and the continuance of the acts constituting the nuisance for an unreasonable period. Thus, it has been said that to constitute a nuisance there must be a continuousness or a recurrence of the acts by which it is created.

See, generally, Glesner, *Landlords as cops: Tort, nuisance & forfeiture standards imposing liability on landlords for crime on the premises*, 42 Case W Res L R 679, 716-737 (1992). "Arrests can constitute evidence of a nuisance, but they must be sufficiently frequent to establish a *habitual* illegal use of the property." *Id.* at 732 (emphasis added).

> ing this factual determination will be the frequency of the conduct, the knowledge or even encouragement by the defendant of its existence, and the extent of the benefit, direct or indirect, derived by defendant from such activity. [*People ex rel Arcara v Cloud Books, Inc*, 65 NY2d 324, 331; 491 NYS2d 307; 480 NE2d 1089 (1985) (emphasis added) (citation omitted), rev'd on other grounds 478 US 697 (1986) (first amendment issue), modified on remand 68 NY2d 553; 510 NYS2d 844; 503 NE2d 492 (1986).][3]

Further, the public nuisance abatement statute is aimed at property that has become so associated with the activity that it has become part of the activity. In *State ex rel Carroll v Gatter*, 43 Wash 2d 153, 160; 260 P2d 360 (1953), the Washington Supreme Court construed its state's "red-light" statute, which, like Michigan's "red-light" statute, i.e., the public nuisance abatement statute, was derived from the Iowa abatement statute.[4] It explained the function of the statute:

> To sustain the application of the act, it must be shown to the satisfaction of the court, by a preponderance of the evidence, that the premises were being used as a house of lewdness, assignation, or prostitution as that term is generally understood. The "use" of the premises of which the statute speaks, requires more than a showing that sporadic acts of prostitution occurred therein. . . .
>
> The statute is not directed to the abatement of commercial eroticism—that is governed by the criminal statutes. It is directed to the abatement of premises which, by reason of sufficient happenings therein, *have absorbed and taken the charac-*

[3] See also *New York City v Big Apple Spa*, 130 Misc 2d 920, 923; 497 NYS2d 988 (1986): "One incident of prostitution has been established. An isolated incident is, of course, not enough."

[4] See *State ex rel Wayne Co Prosecutor v Diversified Theatrical Corp*, *supra* at 246-247.

ter of the acts committed, and have in fact become houses of lewdness, assignation or prostitution. [*Id.* at 160. Emphasis added.]

Additionally, the use of the vehicle in the instant case is distinguishable from the use of vehicles in the "numbers racket" gambling cases because the use of the Bennis vehicle was not "essential" to the act of gross indecency. The vehicle was merely a convenient location. By contrast, this Court has held that in the numbers racket situation "[t]he use of automobiles as *essential tools* in this type of gambling is generally recognized." *Sill* at 575 (emphasis added). Where the vehicle is an *essential* tool to accomplish continuing nuisance activity, the argument that a single act is sufficient is much stronger.

In the instant case, I would find that there was no evidence to support a reasonable inference of continuing or habitual illegal activity. Therefore, it was improper to abate the defendants' vehicle.

II. THE KNOWLEDGE ISSUE

As explained above, I do not believe that the conduct at issue was within the scope of the public nuisance abatement statute, nor was it proven to be of a continuing nature. However, in anticipation of cases that do involve proscribed nuisance activity, I address the proof of knowledge issue.

Beginning with *People v Schoonmaker*, 241 Mich 177; 216 NW 456 (1927),[5] two lines of contrary precedent have developed through Michigan

[5] In *Schoonmaker*, the Court considered whether a public dance hall was an abatable public nuisance under an earlier version of this statute. The defendants did not serve alcohol on the premises, but some of their patrons secretly slipped outside the building during the dance to consume alcohol. The Court addressed the threshold of conduct required on the part of the defendant:

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case law regarding whether the plaintiff must show that the owner of the property knew that the nuisance activity was occurring before the property can be abated.[6] In the instant case, the lead opinion addresses the issue and concludes that proof of knowledge is not required. The statute clearly provides that proof of knowledge is not required.[7] And, although abating the property of innocent owners in forfeiture actions arguably does not violate an owner's constitutional right to due process,[8] that does not make such forfeitures fair or equitable.

> Defendants did not maintain a nuisance unless they permitted such illegal use of the premises; that is, consented to it or acquiesced, and whether they did so was a question of fact . . . .
>
> . . .
>
> One inviting the public to his place for commercial purposes must take care not to invite or acquiesce in transgressions of the law. That transgressions may happen is possible, but remain offenses of the wrongdoer unless tolerated by the occupant to the extent of permissive use of the premises for such purpose or indifference thereto. The statute does not deprive one person of the use of his property by reason of the illegal acts of another, unless the owner's use bears a participating relation to the violation. [*Id.* at 181.]

See *State ex rel Wayne Co Prosecutor v Levenburg*, 406 Mich 455, 462, n 1; 280 NW2d 810 (1979); *State ex rel Oakland Co Prosecutor v Motorama Motel Corp*, *supra* at 228; *State ex rel Wayne Co Prosecutor v Weitzman*, 21 Mich App 705, 710-711; 176 NW2d 463 (1970).

[6] Other cases held that the statute obviated the need for proof of knowledge. See *Bitonti* at 119 (plurality); *Robinson* at 103; *State ex rel Oakland Co Prosecutor v Weaver*, 74 Mich App 462, 464; 254 NW2d 68 (1977).

[7] MCL 600.3815; MSA 27A.3815.

[8] See *Calero-Toledo v Pearson Yacht Leasing Co*, 416 US 663; 94 S Ct 2080; 40 L Ed 2d 452 (1974).

In the instant case, after reviewing cases from the United States Supreme Court, the majority states:

> The United States Supreme Court indisputably allows forfeiture of an innocent owner's property, unless evidence was submitted that the property was stolen or used without the consent of the owner. [*Ante*, p 742.]

This statement sweeps too broadly. The statement should be limited

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The abatement of public nuisances is an equitable action. MCL 600.3805; MSA 27A.3805. See MCR 3.601; 58 Am Jur 2d, Nuisances, § 321, pp 911-912. As such, the trial court has broad discretion to fashion an appropriate remedy.[9] 58 Am Jur 2d, Nuisances, § 355, pp 946-947. Historically, an equity court would not enjoin criminal activity, except in nuisance cases. See Dobbs, Remedies (2d ed), § 2.9(3), p 169. One must remember that the public nuisance abatement action arose in equity because the available legal remedies, i.e., criminal penalties, were inadequate to stop future and continuing injury.[10] Correspondingly, equity courts have shown reluctance to intervene where the activity is criminal. In *People v Lim*, 18 Cal 2d 872; 118 P2d 472 (1941), the California Supreme Court considered whether a gambling establishment could be abated in the absence of a specific statutory provision. It explained the reluctance of equity courts to intervene:

> Conduct against which injunctions are sought in behalf of the public is frequently criminal in nature. While this alone will not prevent the intervention of equity where a clear case justifying equitable relief is present . . ., it is apparent that the equitable remedy has the collateral effect of depriving a defendant of the jury trial to which he would be entitled in a criminal prosecution for violating exactly the same standards of public policy. . . . The defendant also loses the protection of the higher burden of proof required in criminal prosecutions and, after imprisonment and fine for violation of the equity injunction, may be subjected under the criminal law to similar punishment for the same acts. For these reasons *equity is loath to interfere* where the standards of public policy can be enforced by resort to the criminal law, and in the absence of a legislative declaration to that effect, the courts should not broaden the field in which injunctions against criminal activity will be granted. [*Id.* at 880. Emphasis added.]

to due process considerations. The United States Supreme Court has recently held that forfeitures of property under 21 USC 881, the drug forfeiture statute, are subject to the excessive fines constitutional provision. *Austin v United States*, 509 US —; 113 S Ct 2801; 125 L Ed 2d 488 (1993).

[9] This Court has recognized this broad authority: "Of the transcendent power in an equity court, under its general jurisdiction, to restrain and abate a continuing public nuisance for which, by reason of its extent and nature, there is no plain and adequate legal remedy, there can be no question." *Detroit v Highland Park*, 186 Mich 166, 182; 152 NW 1002 (1915).

[10] See *Marsland v Pang*, 5 Hawaii App 463, 475-478; 701 P2d 175 (1985) (reviewing an equity action for nuisance abatement). See, generally, Patterson, *California land use regulation post* Lucas: *The history and evolution of nuisance and public property laws portend little impact in California*, 11 UCLA J of Envtl & Poly L 175, 186-197 (1993) (history of public nuisance). See *Lucas v South Carolina Coastal Council*, 505 US —; 112 S Ct 2886; 120 L Ed 2d 798 (1992).

Particularly, where there is no evidence that the conduct at issue will be continuing in the future, the court should hesitate to exercise its equitable powers to abate the property.[11]

Consequently, I would hold that the trial court, exercising its equitable discretion, should consider the equities and circumstances of each case and tailor the remedy to fit the situation. See *People ex rel Wayne Co Prosecutor v Tate*, 306 Mich 667, 669; 11 NW2d 282 (1943) (the decision to deny an abatement order is within judicial discretion).

The Court in *People v Garner*, 732 P2d 1194 (Colo, 1987), illustrated the remedial possibilities for situations involving innocent parties.[12] The

[11] See 58 Am Jur 2d, Nuisances, § 324, p 913 ("injunctive relief against nuisances should be cautiously given").

[12] The *Garner* court explained:

> [T]he court in the exercise of its equity powers had the authority to order a sheriff's sale of the vehicle on the condition that one-half of the proceeds of the sale, after deduction of

Garner court noted the equitable powers of the trial court:

> Our construction of the Public Nuisance Statute to require the forfeiture of a jointly owned vehicle determined to be a public nuisance, even though one of the co-owners is innocent of any wrongdoing, does not mean that the innocent party's interest in the vehicle may not be recognized and conserved. On the contrary, an action for an abatement of a . . . public nuisance is equitable in nature, . . . and while a court in the exercise of its equity powers may not act contrary to statutory mandate, it does retain a considerable degree of discretion and flexibility in fashioning a decree that achieves a fair result under the particular circumstances of the case. . . . In a forfeiture situation, therefore, a court retains the authority to protect, to the extent practicable and within the framework of the statutory dispositional alternatives, the interest of the innocent party. [*Id.* at 1197. Citations omitted.]

For instance, a trial court could order the property sold, with proportionate net proceeds to be paid to innocent owners, or the court could allow the innocent owners to bid at the sale and acquire full ownership interest, or the government agency itself could pay the proportionate net worth directly to the innocent owners. By leaving such a determination to the equitable discretion of the trial court, each case will be decided on its own merits.

In the instant case, the vehicle was jointly

> fees and costs incident to the seizure and the abatement action, be paid to [the ex-wife], or that [the ex-wife] be given the opportunity to bid at the sheriff's sale on the forfeited interest of [the husband] and thereby acquire the entire interest in the vehicle, or that the vehicle be delivered to the seizing agency . . . upon the agency's payment of one-half of the fair market value of the vehicle to [the ex-wife]. [*Id.* at 1198-1199.]

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owned by Mr. and Mrs. Bennis. Mrs. Bennis had no knowledge that her husband used the vehicle to engage in an act of gross indecency. Assuming arguendo that his conduct came within the reach of the abatement statute, I would hold that the trial court should tailor a remedy to protect her property interest.

In reaching its conclusion that Mrs. Bennis' property interest may be abated, the lead opinion cites *People v One 1979 Honda Automobile,* 139 Mich App 651; 362 NW2d 860 (1984), to support its proposition that proof of knowledge is not required. Its reliance is misplaced. There, the arrangement between the co-owners, a father and his daughter, was really a secured transaction.[13] The father loaned his daughter money to purchase the car. The daughter was the sole driver of the car. The forfeiture action arose because of her use of the car to make a delivery of marijuana. In the drug statute forfeiture provisions there is an exemption for innocent owners. The issue was whether the father's lack of knowledge exempted the vehicle from forfeiture. Instead, the panel focused on the daughter's knowledge and found it sufficient to support forfeiture. The panel did not address the effect of forfeiture on the father's interest. Additionally, *1979 Honda* did not arise under the nuisance abatement statute. Further, this case is factually distinguishable because Mr. and Mrs. Bennis owned the vehicle as joint owners —not as lender/borrower.

The lead opinion tries to distinguish *In re Forfeiture of $53,* 178 Mich App 480; 444 NW2d 182 (1989), because it was based on statutory construc-

[13] A father and a daughter were co-title owners of the car. However, the father did not live with his daughter, his address was not on the registration, the daughter had sole possession of the car, and she paid all the insurance premiums.

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tion—not constitutional violation. There, the panel thoroughly considered the statutory "innocent owner" defense found in MCL 333.7521; MSA 14.15(7521). The panel examined federal and state law interpretations. The panel concluded:

> To summarize, we conclude that § 7521(1)(d)(ii) was intended to establish a separate defense for each claimant who has a personal interest in the property as an owner. Hence, where the prosecution commences an action against a conveyance that is used for unlawful narcotics activity, the forfeiture of the res is subject to the interest of a co-owner who proves that the proscribed act was done without his or her knowledge or consent, express or implied. *The state may only forfeit the ownership interest of the noninnocent owner.* If, for example, the innocent owner has a fifty percent interest in the vehicle, the property may be sold and the proceeds divided equally between the state and the innocent co-owner. [*Forfeiture of $53* at 495-496. Emphasis added.]

Even though this *Forfeiture of $53* arose under a different statute, I believe that it supports an approach that protects innocent co-owners.

In the case at bar, the lead opinion also cites *In re 1976 Blue Ford Pickup*, 120 Ariz 432; 586 P2d 993 (Ariz App, 1978). While it is true that the court upheld the forfeiture of the mother's joint interest in the truck, the court did so after focusing on the unique facts of the case.[14] Arguably, the case was the exception to the general rule. The vehicle was titled in the names of mother *or* son. Under Arizona law, such a title allows *either* joint owner to transfer complete ownership interest in

[14] The mother bought the car with her own money and originally titled the car in her name *and* her son's name. The son moved to Arizona, and the title was changed to mother *or* son. *Id.* at 433-434.

the vehicle without consent of the other."[15] Further, the son had exclusive possession of the vehicle in another state. Unfortunately for the mother, she could have preserved her interest had she been a secured creditor, rather than co-owner. *Id.* at 435.

Notwithstanding its determination of the outcome, the *Blue Ford Pickup* court cited with approval the general rule that innocent owners will not lose their interests:

> "[A]n automobile may *not* be forfeited . . . unless the owner has some connection with the unlawful act, or intended to permit the automobile to be used by a third person in the commission of the unlawful act, or had knowledge it was to be so used. This is in line with the trend of the more recent decisions of the United States Supreme Court in the protection of constitutional rights, both of person and property." [*Id.* at 434, quoting *In re One 1965 Ford Mustang*, 105 Ariz 293, 300; 463 P2d 827 (1970). Emphasis added.]

III. CONCLUSION

I disagree with the conclusion of the lead opinion that the "condition" of the "neighborhood" is the public nuisance. I also disagree with the position of the lead opinion that a single act of prohibited conduct is sufficient to support abatement, without evidence that the conduct is habitual or continuing. Public nuisances, by their very nature, imply a continuing condition. The public nuisance abatement statute is aimed at property that has become so associated with an activity that it has become part of the activity. In the instant case, the vehicle was only a convenient site for the activity to occur. This situation is far different

[15] The statute requires consent to such transfers at the time joint owners obtain such a certificate of title.

from shutting down a building, i.e., a brothel or a crack house, that has become so associated with the illegal activity that it has become part of the activity. Here, the vehicle can be driven out of the "neighborhood" without becoming permanently tainted as a lewd or prostitution vehicle. Additionally, this situation is far different from shutting down a gambling operation that, as an *essential part of its operation,* uses the vehicles to transport betting slips and money.

In conclusion, I would hold that the activity that occurred in this vehicle is insufficient to subject it to abatement under the public nuisance abatement statute.

I would affirm the judgment of the Court of Appeals.

LEVIN and BRICKLEY, JJ., concurred with CAVANAGH, C.J.

LEVIN, J. (*dissenting*). The nuisance abatement statute, as originally enacted in 1915, declared that a "building or place" used for the purpose of prostitution was an abatable nuisance.[1]

Ten years later, during the Prohibition era, "building or place" was amended to add "vehicle," so that it read "building, *vehicle* or place." For the purpose of "prostitution" was changed to read for the purpose of "prostitution or gambling," and to include such a building, vehicle, or place "used by, or kept for the use of prostitutes or other disorderly persons," or used for the manufacture of, or trafficking in, intoxicating beverages.[2]

[1] 1915 PA 272 reading in part as follows:

> Section 1. Whoever shall conduct, maintain, own or lease any building or place used for the purpose of lewdness, assignation or prostitution is guilty of a nuisance, and the building or place in or upon which such lewdness, assignation or prostitution is conducted, permitted or carried on, and the furniture, fixtures, and contents are also declared a nuisance, and shall be enjoined and abated as hereinafter provided.

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I

In the seventy years since the 1925 enactment adding the word "vehicle," there has been no prior reported prosecution of a person for the use of a vehicle for the purpose of prostitution. It thus appears that no automobile used by a man to visit a house of prostitution, or to visit a hotel or apartment house frequented by prostitutes, was abated as a nuisance.[3]

[2] 1925 PA 389 reading in part as follows:

> Section 1. Any building, vehicle or place used for the purpose of lewdness, assignation or prostitution or gambling, or used by, or kept for the use of prostitutes or other disorderly persons, or used for the unlawful manufacture, storing, possessing, transporting, sale, keeping for sale, giving away, bartering, furnishing or otherwise disposing of any vinous, malt, brewed, fermented, spirituous or intoxicating liquors or any mixed liquors or beverages, any part of which is intoxicating, is hereby declared a nuisance and the furniture, fixtures and contents of any such building, vehicle or place, and all such intoxicating liquors therein are also declared a nuisance, and all such nuisances shall be enjoined and abated as hereinafter provided. Any person, or his servant, agent or employe who shall own, lease, conduct or maintain any building, vehicle or place used for any of the purposes or by any of the persons above set forth or where any of the acts above enumerated are conducted, permitted or carried on, is guilty of a nuisance.

The foregoing statutory provision was amended by 1951 PA 80 to add "boat" and "aircraft" as property subject to abatement and forfeiture, and to add trafficking in "narcotic and/or hypnotic drugs" as illicit businesses.

1988 PA 2 substituted "controlled substance" for "narcotic and/or hypnotic drugs."

The current statute, MCL 600.3801; MSA 27A.3801, is set forth in the majority opinion, n 1.

[3] No taxicab, even a taxicab that had been waiting outside a bar frequented by prostitutes, was abated as a nuisance.

No automobile used by a prostitute who hailed men from the vehicle, or who used the vehicle to make a house call, was abated as a nuisance.

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The statute has not heretofore been employed to abate the use of property by someone who was not himself engaged in the illicit activity as a business.[4]

I would hold that a vehicle is not subject to a nuisance abatement action unless the person owning or in lawful possession of the vehicle is engaged in and uses the vehicle in the conduct of illicit activity, described in the statute, as a business.

II

The lead opinion states: "Where testimony surrounding proof of an incident of prostitution unequivocally establishes that the neighborhood has a reputation for prostitution, the property contributing to the continuance of the nuisance may be abated pursuant to the statute."[5] The lead opinion concludes that "the act of prostitution occurring in the Bennis vehicle in a neighborhood known for prostitution" was an abatable nuisance.[6]

The lead opinion thus would hold that a vehicle used by a customer of a prostitute becomes an abatable nuisance when such use contributes to a preexisting prostitution nuisance in a neighborhood, and that a vehicle may be found to so contribute when it is driven to a neighborhood

I do not wish to be understood as saying that a taxicab so used, or an automobile so used by a prostitute, might not be subject to abatement.

[4] In the following cases, vehicles were found to be nuisances on evidence tending to show that they were used in gambling enterprises. See *People ex rel Wayne Co Prosecutor v Bitonti*, 306 Mich 115; 10 NW2d 329 (1943); *People ex rel Wayne Co Prosecutor v Tate*, 306 Mich 667; 11 NW2d 282 (1943); *People ex rel Wayne Co Prosecutor v Sill*, 310 Mich 570; 17 NW2d 756 (1945); *State ex rel Wayne Co Prosecutor v Martin*, 314 Mich 317; 22 NW2d 381 (1946).

[5] *Ante*, p 737.

[6] *Id.*, p 737.

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where prostitutes congregate and is used in the commission of an act of prostitution in such a neighborhood.

The lead opinion thus appears to recognize that ordinarily the occasional use by a person, not himself engaged in an illicit activity as a business, of his vehicle to participate in illicit conduct, was not intended by the Legislature to permit the declaration of the vehicle as an abatable nuisance even though the customer's conduct might be punishable as a criminal offense.

The reasoning of the lead opinion would mean that a customer's vehicle used for prostitution may be abated as a nuisance when driven to and so used on Eight Mile Road in Detroit, but not when so used in Northville or Charlevoix. Some prosecutors and judges may think that way, but legislators do not.

I suggest that compliance with the admonishment, quoted approvingly by the lead opinion, that "[w]e have no other duty to perform than to construe the legislative will as we find it,"[7] requires that we not attribute to the Legislature an intent to permit the seizure of a customer's vehicle, only occasionally used in illicit activity, when the customer is not himself engaged in the illicit activity as a business.

The Legislature may, of course, amend the statute to provide for the seizure of customer vehicles, but, if the Legislature does so, it will surely so provide without regard to the neighborhood in which the customer of a prostitute uses his vehicle, whether in Northville, Charlevoix, or Detroit.

III

Among the least persuasive arguments advanced

[7] *McKibbin v Corp & Securities Comm*, 369 Mich 69, 81; 119 NW2d 557 (1963), quoted approvingly, *ante*, p 739, n 30.

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by the lead opinion is the contention that "place" means the neighborhood, and that it must be so construed to give meaning to all the words in the statute.[8] The word "place" was part of the original enactment, "building or place."[9] The Legislature had in mind that there might be a place that was not a building that might be used for prostitution that should be subject to an abatement action.

The general reputation of the place was admissible under the statute for the purpose of showing that the place is a nuisance.[10] An automobile was not such a place when this legislation was first enacted in 1915. Vehicles were not added until 1925, at which time the Legislature distinguished between the general reputation of a building, and of a vehicle, and of a place.[11] The general reputation of a place may be considered for the purpose of showing that the place is a nuisance, and of a vehicle for the purpose of showing that the vehicle is a nuisance.[12] But the general reputation of a place where the vehicle is driven or used may not, under the statutory provision for use of general reputation evidence, be relied on for the purpose of showing that the vehicle is a nuisance.

Unless a vehicle is itself a nuisance, it is not subject to abatement, and it is not within the intendment of the statute.

Unless a place is itself a nuisance, i.e., a place used for the purpose of prostitution, or used by or

[8] *Ante*, p 733.

[9] See n 1.

[10] 1915 PA 272, § 3.

[11] 1925 PA 389, § 9. See n 12.

[12] In any action brought under this chapter, evidence of the general reputation of the building, vehicle, boat, aircraft or place is admissible for the purpose of proving the existence of the nuisance. [MCL 600.3815(1); MSA 27A.3815(1).]

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kept for the use of prostitutes, it is not subject to abatement, and it is not within the intendment of the statute. The Legislature clearly did not intend that an entire residential neighborhood where prostitutes roam was, as a place, subject to abatement.

IV

The reliance of the lead opinion on the statutory language stating that the prosecutor is not required to provide "[p]roof of knowledge of the existence of the nuisance on the part of the defendants or any of them,"[13] to justify its conclusion that an innocent owner's share of the property is subject to forfeiture, is misplaced. This statutory provision only relieves the prosecutor of the burden of showing such knowledge as part of his prima facie case that there is a nuisance subject to abatement.[14]

This statutory provision does not make an owner's lack of knowledge immaterial or irrelevant regarding whether property that is subject to abatement as a nuisance should be forfeited. As a matter of statutory construction, I would hold that an innocent co-owner's share of the vehicle is not subject to forfeiture. Such a construction is especially called for where the Court by construction today enlarges the application of the nuisance abatement statute beyond its letter and beyond any prior application in its seventy-year history.

[13] MCL 600.3815(2); MSA 27A.3815(2).

[14] See 2 McCormick, Evidence (4th ed), § 342, Presumptions in General, pp 449 ff; § 343, Reasons for the Creation of Presumptions: Illustrative Presumptions, pp 454 ff; § 344, The Effect of Presumptions in Civil Cases, pp 460 ff.

See also LaFave & Scott, Criminal Law (2d ed), § 213, Constitutional Limitations—Due Process and Statutory Presumptions, Defenses, and Exceptions, pp 158 ff.

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Order

Entered:

December 30, 1994

Michigan Supreme Court
Lansing, Michigan

Michael F. Cavanagh
Chief Justice

Charles L. Levin
James H. Brickley
Patricia J. Boyle
Dorothy Comstock Riley
Robert P. Griffin
Conrad L. Mallett, Jr.
Associate Justices

PEOPLE OF THE STATE OF MICHIGAN
ex rel WAYNE COUNTY PROSECUTOR,

Plaintiff-Appellant,

v

JOHN C. BENNIS and TINA B. BENNIS,

Defendants-Appellees.

SC 97339
CoA 132568
LC 88-824379-CZ

This cause having been brought to this Court by appeal from the decision of the Court of Appeals and having been argued by counsel and due deliberation having been had thereon by the Court, IT IS HEREBY ORDERED that the judgment of the Court of Appeals is REVERSED in conformity with the opinion filed herein.

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I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

January 23, 1995

Corbin R. Davis

Clerk

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Supreme Court, U.S.
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MAY 3 1995
OFFICE OF THE CLERK

RECEIVED
MAY 5 1995
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SUPREME COURT, U.S.

No. 94-8729

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1994

TINA B. BENNIS, Petitioner

v.

STATE OF MICHIGAN ex rel. WAYNE COUNTY PROSECUTOR, Respondent

On Petition for a Writ of Certiorari to the
Michigan Supreme Court

RESPONDENT'S BRIEF IN OPPOSITION

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Counsel for Respondent*

QUESTIONS PRESENTED

1. Whether a Michigan nuisance abatement statute, which includes in its parts specific language that "proof of knowledge of the existence of the nuisance on the part of the defendants or any of them is not required" before abatement may be ordered, violates the Due Process Clause of the Fourteenth Amendment and/or the Takings Clause of the Fifth Amendment (as applied to the states by the Fourteenth Amendment): and;

2. Whether the application of that statute to a wife co-owner of an automobile, which resulted in the state court exercising discretion and abating the nuisance (ordering the vehicle sold), violated the Due Process Clause of the Fourteenth Amendment and the Takings Clause of the Fifth Amendment (as applied to the states by the Fourteenth Amendment), where the abatement of the nuisance (the vehicle) resulted from the state court finding that the husband co-owner had used the vehicle to engage in fellatio with a known prostitute, in an area where prostitution was extant, the wife co-owner stated she had no knowledge of that nuisance conduct, and the record established the husband had been observed approaching known prostitutes prior to the specific incident at issue.

LIST OF PARTIES

1. State of Michigan ex rel. Wayne County Prosecutor (Plaintiff below and respondent in the U.S. Supreme Court)

2. John Charles Bennis (Defendant below; not joining in this petition for certiorari)

3. Tina B. Bennis (Defendant below and petitioner in the U.S. Supreme Court)

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IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1994

TINA B. BENNIS, Petitioner

v.

STATE OF MICHIGAN ex rel. WAYNE COUNTY PROSECUTOR, Respondent

---

RESPONDENT'S BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI TO
THE MICHIGAN SUPREME COURT

The respondent, Wayne County Prosecutor's Office, by Timothy A. Baughman, Chief of Research, Training, and Appeals, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Michigan Supreme Court decision in this case, reported at 447 Mich 719, -- NW2d -- (1994).

OPINIONS BELOW

The Michigan Supreme Court opinion is at 447 Mich 719 (1994), and the Michigan Court of Appeals decision is at 200 Mich App 670; 504 NW2d 731 (1993). The trial court gave its findings of fact from the bench, followed by a judgment, which was part of the state appellate record.

JURISDICTION

The Michigan Supreme Court issued its decision on December 30, 1994, with an order of that Court entered January 23, 1995, by the clerk of the Michigan Supreme Court.

Petitioner seeks to invoke the jurisdiction of this Court under 28 U.S.C. 1257. Respondent states that an adequate and independent state ground exists (as seen in the Michigan Supreme Court opinion) to sustain the decision, notwithstanding the state high court having considered the constitutional claim made.

CONSTITUTIONAL PROVISIONS CLAIMED

Petitioner claims that the Fourteenth Amendment of the U.S. Constitution and the Takings Clause of the Fifth Amendment are violated by the Michigan Supreme Court decision.

STATEMENT OF THE CASE

This nuisance abatement matter, invoking the State of Michigan's legislative enactments dealing with nuisance abatement, involved (for purposes of this Petition) a claim by the wife co-owner of a vehicle used in nuisance conduct by her husband that, notwithstanding the explicit state law language obviating the need for plaintiff to show knowledge on the part of a defendant in a nuisance abatement action, her interest in the target vehicle could not be abated consistent with due process of law. After making findings of fact, the state trial court exercised the discretion allowed and fashioned a remedy for the nuisance found: abatement (sale) of the vehicle.

A 1977 Pontiac, owned jointly by John and Tina Bennis, was seized by Detroit police, in an area where prostitution was (at that time) rampant, after the police saw John Bennis pick up

a known prostitute, drive around the corner, and engage in fellatio with her in a residential area. Seizure of the car and abatement proceedings were brought pursuant to MCL 600.3801 et seq.; MSA 27A.3801 et seq.; Michigan's nuisance abatement laws, which, in plain language, state (paraphrased) that a vehicle used for purposes of lewdness, assignation or prostitution is a nuisance and may be abated.

The state statute had been applied to automobiles in prohibition cases, and to buildings where gambling, illegal liquor sales, and prostitution had occurred. In one matter, a room in a hotel was ordered abated (padlocked) based on evidence of one use of the room for prostitution, with no indication that the owner of the hotel had knowledge.

Language of the state statute indicates that "Proof of knowledge of the existence of the nuisance on the part of the defendants or any of them, is not required". MCL 600.3815 (2); MSA 27A.3815 (2). Unlike many drug forfeiture statutes, Michigan's included, there is no exemption for "innocent owners" from application of the law.

The Michigan Court of Appeals, in a 2-1 opinion, held that 1) all owners of the vehicle sought to be abated must have knowledge of the existence of the nuisance, 2) a single incident of lewdness, assignation, or prostitution involving a vehicle was insufficient to create a nuisance, and 3) abatement of a

vehicle requires proof that the sexual conduct complained of was performed in exchange for money. Plaintiff below appealed to the Michigan Supreme Court.

In a plurality opinion, the Michigan Supreme Court, 447 Mich 719 (1994), held that the Court of Appeals decision was incorrect: 1) the statutory language does not require proof of knowledge on the part of a defendant, 2) a single incident of lewdness, assignation, or prostitution is sufficient to abate a vehicle, and 3) the evidence presented at trial allowed an inference that money was exchanged for the sex act or would be, or that the act itself was lewdness.

As for the claim by Tina Bennis that her interest in the vehicle could not be forfeited, and was done unconstitutionally, the Michigan high court, at pages 739-743, considered the "constitutional significance of the abatement of Mrs. Bennis' interest in the vehicle". (State v Bennis, 447 Mich App 719, 739-740 (1994)). After review of controlling cases, the Supreme Court found no constitutional violation and repeated that the Michigan statute obviates the need for proof of knowledge of a defendant, concluding that the trial court did not abuse his discretion in fashioning an appropriate remedy. (Bennis, supra, p. 743).

Because the Michigan high court, after addressing the constitutional claim by Tina Bennis, found an adequate and independent state ground for its decision, the United States

Supreme Court has no basis for jurisdiction. State law and interpretation in Michigan provide for exactly the procedure which occurred in regard to Tina Bennis' interest in the vehicle seized, ordered abated, and sold. Contrary to matters involving statutory language exempting innocent owners, Michigan's nuisance abatement statutes may abate the interest of an innocent owner.

BASIS FOR DENIAL OF U.S. SUPREME COURT JURISDICTION

The Michigan Supreme Court's decision evidences an adequate and independent state ground for its holding, which was formulated after consideration of the constitutional claim made. This Court should conclude that the state ground in this matter is both independent and adequate to support the judgment. Berea College v Kentucky, 211 US 45, 53; 29 SCt 33, 53 LEd 81 (1908); Michigan v Long, 463 US 1032, 103 SCt 3469, 77 LEd2d 1201 (1983).

STATEMENT OF FACTS AND PROCEEDINGS BELOW

Initially, respondent objects to the first paragraph of petitioner's Statement of Facts since it contains matters not in the lower court record (the state trial court).

For purposes of efficiency and brevity, respondent relies upon the statement of facts given in the Michigan Supreme Court opinion at 447 Mich 719, 723-724, the first three paragraphs of which follow verbatim:

> John Bennis was arrested for gross indecency on the evening of October 3, 1988. On that evening, Detroit police officers Jacob Anthony and John Howe set up surveillance after they witnessed a woman "flagging" passing vehicles on the corner of Eight Mile and Sheffield. The woman was later identified as Kathy Polarchio. The officers next observed a 1977 Pontiac, driven by a man, later identified as John Bennis, turn onto Sheffield and stop near Ms. Polarchio, who approached and entered the passenger side of the Pontiac. The officers followed the Bennis vehicle, which proceeded a block, made a U-turn, and stopped. Surveillance continued until the officers noticed Ms. Polarchio's head disappear toward the driver's side of the Pontiac. The officers immediately approached the Bennis vehicle, shined a flashlight into the front seat, and witnessed Ms. Polarchio performing an act of fellatio on Mr. Bennis.
>
> Mr. Bennis was convicted of gross indecency in violation of MCL 750.338b; MSA 28.570(2). The Wayne County prosecutor then filed a complaint alleging that the Bennis vehicle was a public nuisance subject to abatement pursuant to MCL 600.3801; MSA 27A.3801. The vehicle was co-owned by Mr. Bennis' wife, Tina Bennis, who claimed that she had no knowledge that her husband ever used their vehicle in violation of the statute. The trial judge held that the vehicle was a nuisance and abated the interest of defendant and his wife.
>
> The Court of Appeals reversed the decision of the trial court, holding that the prosecution had an obligation under People v Schoonmaker, 241 Mich 177; 216 NW2d 456 (1927), to demonstrate that Mr. Bennis' wife knew that he used the vehicle in a manner proscribed by the statute and failed to offer such proof. The Court of Appeals next held that under State ex rel Oakland Co Prosecutor v Motorama Motel Corp, 105 Mich App 224; 307 NW2d 349 (1981), proof of a single incident of lewdness, assignation, or prostitution is insufficient to establish a nuisance. Finally, the Court of Appeals held that the prosecution failed to demonstrate that an act of lewdness, assignation, or prostitution occurred.

The Michigan Supreme Court also mentioned the following relevant facts, at p. 728 of 447 Mich.: One witness, Sammie Parham, a security guard at a business located at Six Mile and Woodward, testified that he had seen Mr. Bennis in the area during the summer before Bennis' October 3, 1988, arrest. Mr. Parham saw Mr. Bennis talking to a prostitute on two separate occasions and ushered the prostitutes away in both instances just as they were about to enter the Bennis vehicle.

REASONS FOR DENIAL OF CERTIORARI

A. The clear language of the state nuisance abatement statute addresses the concept of an innocent owner in a nuisance context, and requires no need for knowledge to be shown on the part of the defendant, nor does it exempt innocent owners from abatement of their property

Michigan's nuisance abatement statute, in MCL 600.3815(2); MSA 27A.3815(2) states: Proof of knowledge of the existence of the nuisance on the part of the defendants or any of them, is not required. That has been interpreted through appellate cases to allow for abatement of property even though the owner claimed innocence as to the existence of the nuisance. See, for example, Attorney General v Robinson, 250 Mich 99; 229 NW 403 (1930), where one apartment in a fifty-unit building was abated when proof of a single incident of prostitution was submitted. At page 103 of 250 Mich, the Michigan Supreme Court, after reiterating that the statute did not require knowledge on the part of the owner of the building to be shown, held that the evidence showed one apartment had been used for prohibited nuisance conduct, and could be abated. The Robinson case was relied upon the Michigan Supreme Court in this cause. (See State v Bennis, 447 Mich 735-736.)

So, too, may a vehicle owned by more than one individual be abated where the evidence shows it to have been used in nuisance conduct. The state statute, applied consistent with the manifest language of its parts, does not violate any federal constitutional provisions governing due process or unfair "takings". Since there is no specific statutory exemption for "innocent owners" as is found in many narcotic forfeiture provisions, this Court is not faced with the dilemma presented by those matters: loss of property with no knowledge on the part of the owner. Michigan's nuisance abatement statute

makes it clear: innocence, although it may be argued in trial or any hearing, does not excuse possible abatement of the offending property.

B. The Michigan Supreme Court considered the constitutional claim of petitioner, and concluded the abatement, consistent with federal and state cases, was not constitutionally infirm

In rejecting petitioner Tina Bennis' constitutional claim as to the taking of her interest in the nuisance vehicle, the Michigan high court looked at Van Oster v Kansas, 272 US 465, 467; 47 SCt 133; 71 LEd 354 (1926). In Van Oster, a state statute, similar to Michigan's nuisance abatement law, authorized the forfeiture of the interest of an innocent owner or lienor in property entrusted to another who used the property to transport intoxicating liquor (a nuisance condition under the law).

This Court held in Van Oster that it was not questioned that a state in the exercise of its police powers might forfeit property used by its owner in violation of state laws prohibiting liquor traffic. (Van Oster, supra, 272 US at 358). Then, the Court repeated that it was a settled concept that statutory forfeitures of property entrusted by the innocent owner or lienor to another who uses it in violation of the revenue laws of the U.S. is not a violation of the due process

clause of the Fifth Amendment. (Van Oster, ibid) The matter was concluded when the Court stated they did not "perceive any valid distinction between the application of the 14th Amendment to the exercise of the police power of a state in this particular field and the application of the 5th Amendment to the similar exercise of the taxing power by the Federal government...". (Van Oster, ibid).

Next, the Michigan Supreme Court looked at Calero-Toledo v Pearson Yacht Leasing Co., 416 US 663, 683; 94 SCt 2080; 40 LEd 2d 452 (1974) regarding the concept of the innocence of the owner of forfeited property. The court concluded that the claim of Tina Bennis was without constitutional consequence in light of Calero-Toledo and Van Oster. (State v Bennis, 447 Mich at 741).

Michigan law on the issue was next considered, and the court held that there was no constitutional violation which resulted from abatement of Tina Bennis' interest in the vehicle. There was an independent and adequate state ground espoused, after consideration of federal precedents.

CONCLUSION

For all of the foregoing reasons, Tina Bennis' Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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Dated: May 2, 1995
TAB/LR/jh

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

NO. 94-08729

TINA B. BENNIS,

Petitioner,

vs.

STATE OF MICHIGAN ex rel.
WAYNE COUNTY PROSECUTOR,

Respondent.

PROOF OF SERVICE

STATE OF MICHIGAN)
COUNTY OF WAYNE)ss

The undersigned deponent, being duly sworn, deposes and says that she served a true copy of RESPONDENT'S BRIEF IN OPPOSITION

upon: Stefan B. Herpel

the within named attorney for Petitioner, by / / PERSONAL SERVICE or /X/ DEPOSITING SAID PLEADING(S) IN THE U.S. MAIL IN THE CITY OF DETROIT enclosed in an envelope bearing postage fully prepaid, on May 3, 1995 plainly addressed as follows:

Stefan B. Herpel
Attorney at Law
206 S. Fifth Ave., Ste. 200
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Louis J. Caruso
Solicitor General
761 Law Building
525 W. Ottawa
Lansing, MI 48902

JOYCELYN HAMMONS

And said pleading was filed in the Supreme Court of the United States by DEPOSITING IN THE U.S. MAIL on May 3, 1995 addressed as follows:

JOSEPH F. SPANIOL, JR., CLERK
Supreme Court of the United States
Office of the Clerk
Washington, D.C. 20543

Timothy A. Baughman P 24381

Subscribed and sworn to before me
this 3rd day of May, 1995

Joyce Nelson DeVoll
Notary Public, Wayne County, Michigan
My commission expires: 7-1-98

ORIGINAL

No. 94-8729

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1994

TINA B. BENNIS, Petitioner

v.

STATE OF MICHIGAN ex rel. WAYNE COUNTY PROSECUTOR, Respondent

On Petition for a Writ of Certiorari to the
Michigan Supreme Court

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

Respondent's brief in opposition to Tina Bennis' petition for a writ of certiorari makes two principal arguments against granting the writ in this case. The State of Michigan (acting through the Wayne County Prosecutor) argues that this Court has no jurisdiction over this case because the decision relied on both state and federal cases in concluding that the Michigan nuisance statute--and the application of that statute to forfeit Tina Bennis' interest in the Bennis automobile--were constitutional. The Wayne County Prosecutor also contends that the very absence of an innocent owner exemption in the statute is a factor that militates against the grant of certiorari, assuming there is jurisdiction.

Respondent does not take exception to petitioner's contention that the constitutional limits to civil forfeiture generally, and the rights of innocent owners specifically, are issues of vital importance, as demonstrated by several recent decisions of this Court. Nor does the Wayne County Prosecutor challenge petitioner's analysis of the errors in the Michigan Supreme Court's constitutional analysis. Finally, respondent does not disagree with petitioner's contention that the Michigan Supreme Court decision is in direct conflict both with dicta in the United States Supreme Court's Pearson decision and a number of federal circuit and state supreme court decisions that have applied that dicta. Tina Bennis will therefore confine her discussion in this reply brief to the two principal arguments advanced by the Wayne County Prosecutor.

JURISDICTION

Respondent's jurisdictional arguments do not take exception to--and indeed implicitly acknowledge--the thrust of Tina Bennis' explanation of the basis of this Court's jurisdiction.

The Michigan Supreme Court opinion upholding the forfeiture was a plurality opinion joined by three justices; a fourth justice, Justice Griffin, joined in the result only, without writing separately. Petitioner demonstrated that Justice Griffin necessarily had to reject her constitutional claim in order to support the result reached in the case. (Petition for Certiorari at 7, n. 4) That is to say, Justice Griffin could not logically have voted to uphold the forfeiture of Tina Bennis' interest in the Bennis automobile without rejecting her constitutional claim.[1]

Respondent cannot and does not challenge this inescapable conclusion regarding the meaning of Justice Griffin's vote in support of the Michigan Supreme Court judgment. Indeed, respondent's brief implicitly acknowledges this fact by consistently characterizing the plurality opinion as the decision of the Court for purposes of this certiorari petition. (See Respondent's Brief at 4, 5, 9, 10) Thus, for example, respondent states that "the Supreme Court found no constitutional violation. . ." (Id. at 4), that "[t]he Michigan Supreme Court. . . concluded [that] the abatement. . .was not constitutionally infirm" (Id. at 9), and that "the Court held that there was no constitutional violation. . ." (Id. at 10).

Likewise, the Wayne County Prosecutor does not and cannot challenge the fact that the three dissenting justices in Bennis also rejected Tina Bennis' constitutional claim, or at least the due process component of her claim. (See Petition for Certiorari at 4-5) Finally, respondent does not take issue with the uncontrovertible fact that, if the Supreme Court were to grant

[1]Tina Bennis also pointed out that, on at least one previous occasion, this Court accepted jurisdiction to review a state supreme court judgment where there was no opinion for the court, but instead only two concurring opinions, and where one of the concurring opinions rested on adequate and independent federal grounds, while the other did not. See United Air Lines v. Mahin, 410 U.S. 623 (1973) Thus, even if Justice Griffin's vote had either implicitly or explicitly been premised on an adequate and independent state ground, Supreme Court jurisdiction would still be present. (Petition for Certiorari at 6-7)

certiorari and reject the constitutional rule endorsed in Bennis, the judgment of the Michigan Supreme Court as to Tina Bennis would necessarily be altered. (See Petition for Certiorari at 8) In other words, there is no possibility that any decision of this Court correcting the view of federal constitutional law expressed by the Michigan Supreme Court in Bennis would be merely advisory. Taken together and individually, these factors provide a more than adequate basis for the exercise of Supreme Court jurisdiction here.

The argument against the existence of jurisdiction advanced by the Wayne County Prosecutor is not based on any disagreement with the bases for jurisdiction discussed above and set forth in the petition. What the Wayne County Prosecutor contends instead is that the "[t]he Michigan Supreme Court's decision evidences an adequate and independent state ground for its holding, which was formulated after consideration of the constitutional claim made." (Respondent's Brief at 5) Respondent suggests that in addition to relying on federal constitutional cases, the Michigan Supreme Court opinion in Bennis also relied on state (constitutional) cases, thereby establishing an adequate and independent state ground for its holding.

The Wayne County Prosecutor concedes, as it must, that in rejecting Tina Bennis' constitutional claim, the Michigan high court considered the U.S. Supreme Court decisions in Van Oster v. Kansas, 272 U.S. 465 (1926) and Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974). (Respondent's Brief at 9, 10)[2] Respondent further acknowledges, as it

[2]The Michigan Supreme Court also cited to The Palmyra, 25 U.S. (12 Wheat.) 1 (1827); United States v. The Little Charles, 26 F. Cas. 979 (1818), Dobbins Distillery v. United States, 96 U.S. 395 (1877), and Harmony v. United States, 43 U.S. (2 How.) (1844). Bennis, 447 Mich. at 740, n. 32.

must, that the Court concluded on the basis of these federal cases that the forfeiture of Tina Bennis' interest in the automobile gave rise to no constitutional violation. (Id. at 10)

Respondent then makes the conclusory--and completely unsupportable--assertion that because "Michigan law on the issue was next considered, and the court held that there was no constitutional violation. . .," there exists "an adequate and independent state ground" to support the decision. (Respondent's Brief at 10) That assertion finds absolutely no support in the text of the Michigan Supreme Court opinion. Only two Michigan cases were cited in the Court's discussion of Tina Bennis' constitutional claim, and neither case even addressed any state (or, for that matter, federal) constitutional issues. Bennis, 447 Mich. at 741-42. Instead, those two cases merely construed the meaning of the statutory innocent owner exemption provided for in another statute (the Michigan drug forfeiture statute).

In one of those cases, People v. One 1979 Honda Automobile, 362 N.W.2d 860 (1984), the Michigan Court of Appeals held that the statutory exemption did not apply to a co-owner of an automobile who had no knowledge of the illegal use of the car by the other co-owner. 362 N.W.2d at 862. But as the Michigan Supreme Court readily acknowledged in Bennis, "[t]he unconstitutionality of the forfeiture was not even considered" in that case. Bennis, 447 Mich. at 742. The holding in the other case cited in the Bennis opinion, In re Forfeiture of $53.00, 444 N.W.2d 182 (1989), also was confined to the issue of the proper construction of the innocent owner defense in the Michigan drug forfeiture statute. Indeed, that panel of the Michigan Court of Appeals reached precisely the opposite conclusion regarding the scope of the statutory defense. 444 N.W.2d at 189; see also Bennis, 447 Mich. at 742, n. 35 (discussing case and noting that decision was based on statutory, rather than constitutional, grounds). The

Michigan cases cited in Bennis did not even address constitutional issues regarding the government's power to forfeit an innocent co-owner's property. Thus, their citation by the Michigan Supreme Court could not have created an adequate and independent state ground for the decision that would deprive this Court of jurisdiction.

Respondent's citation to this Court's decision in Michigan v. Long, 463 U.S. 1032 (1983) in support of its jurisdictional position is completely unavailing. (Respondent's Brief at 5) In Long, the United States Supreme Court established a presumption that jurisdiction exists "when it is not clear from the opinion itself that the state court relied upon an adequate and independent state ground and when it fairly appears that the state court rested its decision primarily on federal law." Long, 463 U.S. at 1042. The state court decision for which review was sought in Long was a Michigan Supreme Court decision that referred to both the state and federal constitutions in declaring a search to be unconstitutional. The Michigan Supreme Court opinion in Long cited to no state constitutional cases in support of its holding, however. Instead, the Michigan court relied solely on its interpretation of United States Supreme Court cases in concluding that the search was unconstitutional.

The United States Supreme Court held that, because the state ground articulated by the Michigan Supreme Court was not independent of the federal ground, jurisdiction to review the Long decision was present. In so holding, the Court explained that even if the state constitution "has been interpreted to provide independent protection for certain rights also secured under the Fourth Amendment, it fairly appears in this case that the Michigan Supreme Court rested its decision primarily on federal law." 463 U.S. at 1044.

This case presents an even stronger basis for Supreme Court jurisdiction than did Long.

for here the Michigan Supreme Court opinion rests exclusively on federal law. Unlike the opinion in Long, the Bennis opinion does not even refer to the Michigan Constitution. It likewise relies on no state cases deciding state constitutional issues. The only sources of constitutional law relied upon in Bennis are U.S. Supreme Court cases that decided federal constitutional issues.

More fundamentally, in this case, in contrast to Long, the Michigan Supreme Court upheld the validity of a statute and its application against constitutional challenge. Where a state court "upholds a particular action on the ground that it offends neither federal nor state law, then the Supreme Court has power to review the state court judgment--though on the federal question only." Stern, Gressman, et al., Supreme Court Practice 147-48 (7th Ed. 1993) (citation omitted) (emphasis in original). Thus, even if the Bennis decision is read as having held that the nuisance abatement statute and its application to Tina Bennis passed muster under both the Michigan Constitution and the federal Constitution, this Court would still have power to review the Michigan Supreme Court's holding as relates to the federal Constitution. In short, respondent's assertion that the Bennis opinion evinces an adequate and independent state ground in support of the judgment is completely without merit.

REASONS FOR GRANTING CERTIORARI

The Wayne County Prosecutor's brief challenges only one of the several factors advanced by petitioner in support of granting certiorari in this case. Respondent makes the anomalous argument that the lack of a statutory exemption for innocent owners in the Michigan nuisance statute, rather than favoring Supreme Court review of this case, actually militates against it.

Respondent states repeatedly that the Michigan nuisance abatement statute contains no statutory exemption for innocent owners and specifically allows for forfeiture of an innocent owner's property, as if this fact somehow establishes the constitutionality of the statute and its application to Tina Bennis. (See Respondent's brief at 2, 3, 5, 7, 8, 9) Thus, for example, respondent asserts that "[s]ince there is no specific statutory exemption for 'innocent owners' as is found in many narcotic forfeiture provisions, this Court is not faced with the dilemma presented by those matters: loss of property with no knowledge on the part of the owner." (Respondent's Brief at 8)

Respondent's argument is, to put it mildly, difficult to comprehend. It obviously begs the question to suggest that the Michigan nuisance abatement statute or its application to Tina Bennis comports with the Fifth and Fourteenth Amendments just because the statute expressly authorizes the taking of an innocent owner's property and was applied in a manner consistent with that express authorization. Indeed, the fact that the statute contains no exemption for innocent owners--and even goes so far as to expressly include innocent owners within its reach--is exactly what gives rise to and necessitates resolution of the constitutional issue. Just two years ago, this Court reserved decision on the same constitutional issue presented here precisely because the drug forfeiture statute in question contained an exemption for innocent owners. See Austin v. United States, 509 U.S. ___, 125 L. Ed. 2d 488, 502 & n. 10 (1993) (stating that it was once again reserving the question "whether it would comport with due process to forfeit the property of a truly innocent owner" because "the forfeiture provisions at issue here exempt 'innocent owners'.") The clear implication was that the Court would have decided this "serious" constitutional issue if the federal drug forfeiture statute had not provided for such an exemption.

Id. The fact that the Michigan legislature has expressly chosen not to exempt "innocent owners" from the scope of the nuisance abatement statute, and that the statute was applied so as to effect a taking of property from an innocent owner, is plainly a consideration which (together with the other factors discussed in the petition) supports granting the writ of certiorari in this case.

CONCLUSION

For all of the reasons set forth in this brief and in her petition, Tina Bennis' petition for a writ of certiorari should be granted.

Respectfully submitted,

Stefan B. Herpel, P.C.

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Dated: May 9, 1995

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May 9, 1995

Kathy Tycz
Documents Control
United States Supreme Court
1 First St., NE
Washington, D.C. 20543

Re: Bennis v. Michigan; No. 94-8729

Dear Ms. Tycz:

As I advised in my telephone conversation with you this afternoon, I am enclosing 12 copies of Petitioner's Reply Brief in Support of Petition for a Writ of Certiorari, in connection with the above-referenced case, along with a proof of service.

Thank you again for your assistance in this matter.

Very truly yours,

Stefan B. Herpel

Stefan B. Herpel

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cc: Larry L. Roberts, Esq. w/enc.
Timothy A. Baughman, Esq. w/enc.

No. 94-8729

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1994

TINA B. BENNIS, Petitioner

v.

STATE OF MICHIGAN ex rel. WAYNE COUNTY PROSECUTOR, Respondent

---

On Petition for a Writ of Certiorari to the
Michigan Supreme Court

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Stefan B. Herpel, counselor for petitioner and a member of the Supreme Court bar, states that on May 9, 1995 he served a copy of Petitioner's Reply Brief in Support of Petition for a Writ of Certiorari on Larry L. Roberts and Timothy A. Baughman by placing a copy of that document in each of two envelopes, postage pre-paid, one of which was addressed to Larry L. Roberts, Esq., Assistant Prosecuting Attorney, 1441 St. Antoine, 11th Floor, Detroit, MI 48226, and the other to Timothy A. Baughman, Chief of Research, Training, and Appeals, Wayne County Prosecutor's Office, 1441 St. Antoine, Detroit, Michigan 48226, and by depositing each envelope in the U.S. Mail.

Stefan B. Herpel 5-9-95

Stefan B. Herpel Date

(5)

Supreme Court, U.S.
FILED
AUG 4 1995
CLERK

No. 94-8729

In The

Supreme Court of the United States

October Term, 1995

TINA B. BENNIS,

Petitioner,

v.

STATE OF MICHIGAN ex rel.
WAYNE COUNTY PROSECUTOR,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Michigan

JOINT APPENDIX

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Petition For Certiorari Filed March, 29, 1995
Certiorari Granted June 5, 1995

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11/16/88	Judgment Ordering Forfeiture of Car
08/31/90	Application for Delayed Appeal to Michigan Court of Appeals by Tina and John Bennis
01/02/91	Order Granting Application for Delayed Appeal
07/19/93	Court of Appeals Opinion Reversing Judgment of Circuit Court
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04/20/94	Application for Leave to Appeal Granted
12/30/94	Michigan Supreme Court Opinion Reversing Court of Appeals
01/23/95	Remittitur Order

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

STATE OF MICHIGAN EX REL JOHN D. O'HAIR, PROSECUTING ATTORNEY FOR WAYNE COUNTY,

Plaintiff,

-vs-

JOHN C. BENNIS and TINA B. BENNIS,

Defendant.
_____/

Civil Action
No. 88- - CZ
Public Nuisance
Abatement Action

A. George Best II
(P-27749)
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88-824379 CZ 10/04/88
JDG: RICHARD C. KAUFMAN
MICHIGAN STATE OF
VS
BENNIS JOHN C

COMPLAINT FOR ABATEMENT OF PUBLIC NUISANCE

NOW COME the People of the State of Michigan, by and through JOHN D. O'HAIR, Prosecuting Attorney, County of Wayne, ANDREA L. SOLAK, Chief, Special Operations and A. GEORGE BEST, II, Assistant Prosecuting Attorney, and in support of this Complaint states unto this Honorable Court that:

JURISDICTIONAL AVERMENTS

1) This public nuisance abatement action is brought in accordance with MCLA 600.3801, et seq., as amended, which provides in relevant part that:

> Any . . . vehicle . . . used for the purpose of lewdness, assignation or prostitution . . . or used by, or kept for the use of prostitutes or other disorderly persons . . . is declared a nuisance, and the . . . fixtures, and contents of the . . . vehicle . . . are also declared a nuisance, and all . . . nuisances shall be enjoined and abated as provided in this act and as provided by the court rules.

2) Pursuant to MCLA 600.3805, as amended, the Prosecuting Attorney may initiate and maintain an equitable action to abate such nuisances and to obtain the perpetual injunction of any person, his servant, agent or employee, who owns, leases, conducts or maintains such vehicle which injunction shall be binding on the persons so enjoined throughout the judicial circuit in which it was issued. MCR 3.601(A).

3) Pursuant to MCLA 600.3810(2), as amended, an owner of a vehicle is deemed to be the person in whose name the vehicle is titled, and any chattel mortgagee or assignee thereof or other lien holder whose lien has been filed. The Plaintiff is required by statute to join such mortgagee, assignee or lien holder as a party defendant to the nuisance action.

4) The vehicle which is the subject of this action is specifically described as:

1977 Pontiac, VIN# 2L69P7P329868

5) Pursuant to MCLA 600.3825(1), as amended, when the existance [sic] of the alleged nuisance is proven, an order of abatement shall be entered by the court and the court shall direct the removal from the building or place of "all furniture, fixtures and contents therein and shall direct the sale thereof" and shall direct the "effectual closing of the buiding [sic] or place against its use for any purpose, and so keeping it closed for a period of one year."

6) Pursuant to MCLA 600.3825(2), as amended, any vehicle, boat, or aircraft found by the court to be a nuisance within the meaning of that chapter, is subject to the same order and judgment as any furniture, fixtures and contents as set forth in paragraph five, infra.

COUNT ONE

7) In support of this Complaint for Public Nuisance Abatement, the Plaintiff asserts the following facts:

(a) On 3 October 1988 at approximately 8:10 PM. an undercover Detroit Police Officer in the area of Sheffield and West 8 Mile Road in the city of Detroit observed KATHY MARIE PALARCHIO flag down the described vehicle drived [sic] by a male later identified as JOHN CHARLES BENNIS.

(b) After BENNIS stopped the vehicle, PALARCHIO was seen to enter the vehicle which then drove to the end of the block, turned around, and drove halfway back up the block where it parked.

(c) After the vehicle parked, PALARCHIO'S head was observed to drop below the windows of the car and

out of view of the officers. The officers approached the car and, upon looking inside it, saw PALARCHIO in the process of commiting [sic] an act of fellatio upon the erect penis of BENNIS.

(d) BENNIS and PALARCHIO were arrested and charged with indecent and immoral conduct. The observed conduct is a violation of MCLA 750.449a, engaging the services of a prostitute and MCLA 750.338b, gross indency [sic] between male and female.

(e) Investigation has revealed that PALARCHIO has eight prior arrests for accosting and soliciting, six arrests for disorderly conduct (flagging cars in an ares [sic] known for prostitution activity).

8) Investigation has revealed the titled owner(s) of the vehicle here at issue is(are): JOHN C. BENNIS and TINA B. BENNIS.

9) Investigation has revealed that the lien holder(s) of record related to the vehicle here at issue is(are): none.

10) The vehicle is currently being held by the Detroit Police Department pending conclusion of this matter.

11) The Plaintiff asserts that based on the allegations set forth above (and to be established at any hearing related to this action) the vehicle described herein has been used for the purpose of lewdness, assignation or prostitution, or has been used by, or kept for the use of prostitutes or other disorderly persons and that such use(s) mandate the finding that such described vehicle is a public nuisance that must be abated as provided by statute.

CONCLUSION AND RELIEF

WHEREFORE, the Plaintiff respectfully requests the following relief: (1) a finding by this Honorable Court that the described vehicle is a public nuisance; (2) the entry of an order of abatement directing the sale of the vehicle and its contents in accordance with the applicable statute; and (3) the entry of a permanent injunction against all persons described in this Complaint shown to have maintained the nuisance.

Respectfully submitted,

JOHN D. O'HAIR
Prosecuting Attorney
County of Wayne

ANDREA L. SOLAK
Chief, Special Operations

/s/ A. George Best, II
A. GEORGE BEST, II P27749
Assistant Prosecuting Attorney
11th Floor, 1441 St. Antoine
Detroit, Michigan 48226
Phone: (313) 224-5738

Dated: 4 October 1988

No. 88-824-379-CZ

In the Third Judicial Circuit for the County of Wayne, State of Michigan

Michigan

v.

John Charles Bennis and Tina B. Bennis

Transcript of Testimony of Tina Bennis

* * *

[152] TINA BENNIS

called as a witness by the Defense, being first duly [153] sworn, was examined and testified on her oath as follows:

DIRECT EXAMINATION

BY MR. DENENFELD:

Q. State your name for the record, please.

A. Tina B. Bennis.

Q. Your address?

A. 1901 Colonial, Royal Oak.

Q. Are you employed?

A. No.

Q. Are you related to the defendant in this matter, John Bennis?

A. Yes.

Q. How are you related to him?

A. I'm his wife.

Q. How long have you been married?

A. Nine years.

Q. Are you a co-title owner to the vehicle that has been seized in this case?

A. Yes.

Q. Can you describe for the Court when this vehicle was purchased and the circumstances under which it was purchased?

A. It was purchased in September and –

Q. September of 1988?

A. Yes.

[154] Q. You had the car for approximately how many days before it was seized?

A. Maybe three weeks, four weeks.

Q. How much did you pay for the car?

A. $600.00.

Q. $600.00 in cash?

A. Yes.

Q. Had you saved money to buy this car?

A. Yes.

Q. For how long?

A. It's been quite a while. We have never had two cars.

Q. Who did you buy it from, a dealer or private person?

A. Private.

Q. You had the car for three weeks before it was seized?

A. Yes, approximately.

Q. Were you present with your husband when he was driving home from work on October 3rd?

A. No.

Q. Did you have knowledge that your husband was going to do anything but come directly home from work?

A. No.

Q. Do you have any knowledge of your husband soliciting prostitutes?

A. No.

MR. DENENFELD: Nothing further.

[155] CROSS-EXAMINATION

BY MR. BEST:

Q. Mrs. Bennis, you have indicated I believe that this was a second car?

A. Yes.

Q. Okay. What is the type of car that you have, your first type of car?

A. It's a '78 Oldsmobile.

Q. All right. Some time on October 3rd or October 4th, did you become aware that your husband had been arrested?

A. Late in the afternoon on the 4th.

Q. How did you become aware of that?

A. He never came home from work and it got to be 8:00 o'clock in the morning. So, I called his work 'cause he's never done this before and I discovered he wasn't there. So I proceeded to go through Missing Persons. I thought he was missing. I actually thought something had happened.

So, the Livonia Police, I had to go out and make a report and then a couple of hours later, they had called me saying they had found him, that he was being held in Detroit and that's all they told me. They didn't tell me why.

Q. Did you then contact Detroit?

A. They just told me there was going to be a hearing at 2:00 o'clock but they still didn't tell me anything.

Q. Where does your husband work, ma'am?

[156] A. At a steel company in Livonia.

Q. You expected him home on October 3rd in the evening?

A. Yes.

Q. What time did you expect him home?

A. I don't expect him. He works till his jobs are done. It's not unnormal for him to to come in at 9:00 o'clock at night.

Q. He'd arrive home possibly earlier than that?

A. Yes.

Q. How many days a week does he work?

A. He works five days a week, sometimes overtime, weekends.

Q. The purchase price of the car was around $600.00?

A. $600.00.

Q. You saved up out of earnings that your husband earned at the steel plant?

A. Yes. I've done babysitting over the summer, things like that.

Q. So, part of the money is his and part is yours?

A. More mine. We use his for bills. I was saving mine on the side.

Q. Now, the other car, the '78 Oldsmobile, how long has that car been owned by the family?

A. Just this past summer, too. It was given to us.

MR. BEST: All right. Nothing further.

MR. DENENFELD: Just one more question, your Honor.

[157] REDIRECT EXAMINATION

BY MR. DENENFELD:

Q. I understand from your testimony, Tina, that your husband had never not come home at night before this?

A. No.

MR. DENENFELD: Nothing further.

* * *

Transcript of Bench Ruling of Trial Court

* * *

[178] THE COURT: Thank you. These matters by their very nature are tried by the Courts and have been so for centuries in terms of questions of civil relief.

The Court is not unmindful that this is the first of what may be a series of trials. So it should be – I don't know how to say this any more sharply or clearly, I'm confining myself to, A, the arguments made as a matter of law here in this case, and B, the factual presentation as made in this case.

Whether additional arguments or different legal arguments might be advanced in the cases to follow or next week or month, you take each case as presented and the same, too, with the factual situation. The next fact situation [179] may differ completely from this one.

So that when the Court speaks on this, in this matter today, it is for the matter before the Court, the case before us.

I try to stress that because I don't want to be misunderstood. I'm aware of the substantial public interest and various representatives of mediums that are here. That's number one. I'm speaking only as to this case. I'm not shutting the door to arguments that might be advanced in any other lawsuit.

Second, I think it's terribly important that everybody understand as a broadbrush stroke here that we are not attempting as a State of Michigan, as I read the statute, to try to take every car involved in every act of prostitution or lewdness or assignation any time any place and I think

it's strongly misunderstood that that could and/or should happen or that's what the statute calls for.

It is just the reverse or rather a requirement of this particular statute. It requires the demonstration that not only did an act of lewdness or prostitution or assignation take place and the vehicle was involved specifically or could be some other mode of transportation – here we're dealing with a particular car, and that coupled with it there must be a demonstration that it was a public nuisance encompassed here.

[180] A singular act some time some place is not going to be involved and every time somebody is involved in terms of this city or this county, the car is to be taken or something of that nature.

Specifically as to the testimony that this Court has heard, we have heard testimony that on October 3rd, 8:10 p.m., Officer Anthony and his partner were in the vicinity; that there had been previous arrests of the young lady in question by officer Anthony. He's familiar with her and familiar with the particular area; that observing her conduct with waving her arms back and forth on Eight Mile, in the Eight Mile/Sheffield area, he sets up a surveillance.

Some 15 minutes goes by and then Mr. Bennis in his vehicle in question, a '78 Pontiac, comes by and they then drive down onto Sheffield, a side street, and get themselves off of Eight Mile.

When the officer then observing the Pontiac turning and facing north on Sheffield, which is a residential street, the vehicle stops. The lights go off. The officer

waits till he loses sight of one of the two individuals in the car, the passenger, the female.

Without belaboring it, when the officer arrives, he sees a woman's head in the lap of Mr. Bennis. That ultimately Mr. Bennis's penis is noted to be exposed and his pants are down and that the young lady's mouth comes off of [181] Mr. Bennis's penis.

That by any definition is an act of fellatio and an act of fellatio certainly falls as far as this Court is concerned within the definitions provided, as long as we are satisfied that it's tied in with for money or for prostitution if you will.

Now, I think additional testimony that was presented is and it should be appreciated, this was some 7:55 or so in the evening. The officer has indicated and we stress this, I have to as far as I'm concerned look at all of the collective witnesses who testified.

If you single out a witness and say, "Well, the case rises or falls on that witness," it's true. There won't be a case. I don't know there could be a case under the statute with a single witness. Can't imagine how you would do it.

It's a fabric and you look at that collective fabric and if you will, a quilt, and you put that garment together through the series of testimony of individuals who appear before the Court.

The officer himself said that given his tasks, he has made three arrests in this immediate area. One extrapolates from that testimony that he himself has assisted

other officers in making arrests. It works in that fashion by its very nature.

[182] Miss Worthy testifies she's an assistant prosecutor. It's simply to demonstrate that no one is immune. I presume that's the demonstration or that she was willing to come forward.

I would presume this would be some moment of discomfort for someone to take time off to come to Court and indicate when you have lived in a neighborhood since mere May, 1988, and this is only the early days of November, and in one of those months she wasn't here. She was at a seminar in some other part of the country.

Since that time, she has been accosted seven to eight times while attempting to simply take a bus to go to work in the morning at 6:15 or 7:00 clock and even on Sundays when you're attempting to go to work. That it's caused her to be forced to walk on side streets rather than a main public thoroughfare of this particular community of Detroit.

Miss Kirksey indicated a necessity has arisen for the creation of a CB patrol in the area of the Green Acres, a CB patrol beyond that of a civic association that one might normally find and that she has indicated that once again as part of this fabric that in the months of July, August and September, there were some 32 observations; that they're imperfect by their very nature.

It's subjective. I concede that and also only as [183] good is that which someone wishes to write down. She allowed they're not on duty at all times by any means but it's part of once again the over-all fabric to look to.

She, too, has been the victim of being accosted just this past fall on Woodward in the afternoon, to suggest a very limited geographic area that you look at, probably at best a couple of square miles or a mile square, even to the area she was defining when she was accosted.

It's apparently frustration all over because the next testimony we heard was that from Miss Knight. We've heard early morning. We've heard now Miss Knight coming home at about 1:30 in the evening. She lives on the street next to the one we're dealing with here today; that there are people sitting in front of her house in automobiles at 1:30 a.m. in a residential neighborhood.

She can't say with a degree of frequency. There have been occasions where cars have actually had people getting out – women getting out and start walking back towards the bank parking lot at Eight Mile at that hour, 2:00 and 3:00 in the morning, 1:30 in the morning, consistent even with the testimony we heard here where a car is turned around and parked to the north.

There may be a rhythm or pattern on the part of those engaged, the ladies engaged in this kind of thing that they have a strategy or reason why they want to be able to [184] conceivably, if a CB'er comes up, they want to get back up on Eight Mile rather than stay off on the side streets.

I don't know, but she certainly indicated she's had the situation where there's this activity, this walking about and the problems she's had, that it goes back for a number of years back to 1982.

She speaks in terms of conclusions based on appearances, clothing or lack of same, hair, time of night, to assist her as I think it's within the purview of a layperson to suggest that she believes that these women are engaged in certain forms of conduct.

Mrs. Wilson, a mature woman, volunteered that her age was 59, who also lives on Gardendale, just the next block over, she has been a resident there since 1981.

At all times, day and night, every day, 365 days of the year, that she has had to suffer, put up with the acts and frustrations of those engaging in some forms of activity in front of her home, her neighbors, that you cannot even walk along Eight Mile Road now; that even when she wants to go for a little walk in the morning, she has to have her husband trailing behind her and even there, to their credit, you had police officers who expressed concern as to her welfare.

The heightened tensions that must be existing for all of that to take place. It's rather extraordinary. It's [185] right off a residential neighborhood.

She's indicated that she has observed these young women walking back and forth, never been on a bus but always at the bus stops.

She also describes the skimpy dressing and clothing and so forth. She observed the vehicles take the girls. The girls get in. Some signal. Some don't. Almost consistently and it stands to reason, stands to reason, that one doesn't engage in sexual activity for the most part while you're sitting there on Eight Mile Road. It's a little bit awkward and mot [sic] the least bit dangerous.

One could use a little play on words about the risk of being rear ended or something during the course of other types of activity but it stands to reason that one is going to go off to the side streets to avoid the risks of either arrest and/or danger to themselves.

Thus, you're going to go right smack into those side streets, those neighborhoods, into a residential area of the city and I have no doubt as Mrs. Wilson described it that this is taking place all times from her testimony and from the collective testimony of the others.

She's indicated that she's of course not come upon an actual act. I don't think that the statute required that but she certainly had occasions when she's seen two heads and then only one head above the dashboard or windows and [186] then off one goes back to Eight Mile Road.

She's indicated that it's two to three times a week that she had been subjected to this kind of observation.

Mr. Russell, who by the very nature of his work would suggest a chap trained in both analysis and observation, has lived on Gardendale for some 20 years. He says this is a growing, growing, growing problem.

He has on two occasions – how much do you need? Do you need two witnesses, three, five, ten? On two occasions where he's not out looking for problems and/or activity but attempting to live within his community, he has had occasion to come upon individuals at the alley south of Eight Mile and Gardendale and another time where they're outside of the vehicle in the corner behind that vacant building, both acts of fellatio.

He has been solicited by prostitutes some half a dozen times and along Eight Mile Road a month ago, on one of two occasions during the course of the summer, he's engaged in perhaps a wise and not-so-wise suggestion that some of the johns move on only to be subjected to verbal abuse and obscenities.

He has seen an increase in this activity and he has now reached the point where if he is like any other individual I know, he has a home in which some 25 percent of [187] his income probably goes towards the maintenance and upkeep of that home. That's the average in this country.

He now has to worry about his eight year old, five year old, those youngsters. Now can they go out and play like most of us used to do as kids or do you have to worry about your youngster then coming upon an act of prostitution, observing fellatio, cunnilingus or whatever it may be, but stay with just that before us today.

Every time you send your youngster out to play on the streets, he has already had that problem, he said, personally with the vacant lot that is just six doors north of him.

Mr. Parham then tells us that he recognizes Mr. Bennis. One of the reasons for the Court's ruling at the show cause proceeding was the risk of this type of vehicle and this type of activity continuing and that it seems to have been borne out.

Not that this vehicle was used again because I didn't allow it to be returned till such time as trial, but it is borne out to the extent that sure enough, there's a pattern

if you believe Mr. Parham and I do, of conduct such that there would be substantial reason to think after you have been chased off even this summer from a neighborhood by a security guard that you elect to come right back in to that general neighborhood of some mile and mile and-a-half [188] away.

If you're prepared to do that, I think my judgment at the show cause proceeding has been affirmed in terms of at least holding that vehicle till a speedy trial could be had.

Some of the things that I don't fully understand, I was a little surprised. I thought frankly that this was the only vehicle that the defendants in this case had and I can well appreciate – this is merely observation, that being the only car, that there was this true need to try to get their vehicle back in some fashion.

Now I learn there are two vehicles. This was a second car that was obtained this September for some $600.00. Well, so be it.

I don't know in every case what I'm going to do with co-title owners, holders of vehicles. I'm going to have to make a case by case determination.

I think the case law may allow for it but in terms of this Court's equity and authority, I'm going to exercise my discretion in each singular case and one remedy that I may employ depending upon the circumstances will be one of if I find the public nuisance and order the abatement, I may order after costs are deducted and vehicle sold, I may order one-half of the balance to go to what is referred to as the innocent co-title holder.

[189] That will be done on a case by case basis depending upon the evidence and proofs submitted.

In the instance before us here – well, see, the problem I've got is that the value is such that even under equity – well, we'll see. I just don't know that it's going to be anything here to be concerned with. If it suggests that this Court is reaching a conclusion, yes, you may so conclude.

I have heard suggestions here by the defense counsel, Mr. Bennis's counsel, that what we should do is block off some of the streets.

We have already called upon folks in a given community, many sub-sections of this city and other communities to put bars on their windows, to have alarms on their cars, to walk in absolute fear any day or night because of their neighborhood, and the quality and condition of their neighborhood and now, let's kind of box you in or kind of build up some walls some more. Now, you can't use your streets.

That smacks of an insensitivity that I don't really think was intended.

The criminal law is designed to address the individual before the Court. Whereas the civil remedy available here is designed to address a broader problem of a public nuisance and they are truly distinguishable in that [190] only this civil rememdy [sic] can in some instances address the problem.

One of a couple of different concerns raised, one is how can you tell a prostitute? I think it's somewhat specious to suggest that but for someone who has a card

or something to hand out saying, "I'm a prostitute," that one can't draw reasonable and rational conclusions.

I suggest that the standard was set in a slightly different factual situation by the Supreme Court Justice Potter Stewart of, "I know it when I see it."

He felt that he could define obscenity and I suggest, too, that so can any layperson define someone who is actively engaging in the business of accosting and soliciting on their street corner.

When I hear the collective conduct, unless Mr. Bennis of course who did elect to take his Fifth Amendment right and I won't draw an inference against that, unless and til such time as one would be in a position to argue that, "I was with some family member" or something of that nature, it's not uncommon to have based on the conduct we have heard along that strip, I think, by a preponderance of the evidence, I can be perfectly comfortable this was a young woman engaged in business to perform an act of gross indecency and lewdness as was Mr. Bennis.

The law also it should be understood is concerning [191] itself here with this geographic area before us and I've heard it argued, is this too strong a remedy, this civil remedy?

I don't know that that argument would be advanced if we were – I don't know – at Kercheval and Moran and the type of conduct I've heard continued day in and day out, night after night and day after day, 365 days a year, or if it were along Northwestern Highway in Oakland, I wonder what hue and cry there would be.

But what we have here, the individual in this case, an individual from another community, Royal Oak, comes in to show just blatant insensitivity.

You look about you and you see people's homes where they raise their children, where their families are living, where they are having probably most of their money in this world going towards the purchase and maintenance of their home, for one's personal pleasure one contributes to what is clearly established in this case to be a public nuisance in that community, the Pembroke, Livernois, Eight Mile, Woodward community.

That sort of insensitivity is such that when one says in return, you run the risk, sir, by engaging in that sort of conduct and contributing to the public nuisance of that, you run the risk of your automobile, I find that a perfectly reasonable balance to the rights of the citizens [192] of that community to be free of this kind of obscene conduct within their neighborhood.

It should also be noted and I heard reference to those who engaged in prostitution. I'm sure that somewhere along the line there's been someone from the organization that Mr. McGuire is, and this is not to be denigrating, who has along the line defended in some fashion those who are engaged in prostitution.

Now suggesting a remedy is too harsh or we're insensitive, that these women are going off and no one ever does anything about the johns, closed quote.

It's true. I suggest that for men, especially particularly for men, men in the law, men in Courts, trial Courts, Appellate Courts, we are insensitive because we

conceivably place ourselves in a but-for position or there but for the grace of God or whatever, some sort of mentality.

If you then say as to what remedy should we use and how should we try to solve this community problem, this public nuisance, well, I suggest to you that we have got jails. In point of fact, we don't.

Well, I suggest to you that put the prostitutes in jail and someone says, well, off she went for 60 or 90 days. No one sheds a tear, but let the john run the risk of the loss of some of his property, and everybody cries, "How [193] harsh, how severe a remedy."

But for the john, the young lady hasn't got any business. It's classic chauvinism and sexism where we are so concerned about some mere property rights or mere property loss, not rights, rights we should be concerned about but mere property loss versus the loss of one's freedom, if you were the prostitute, the woman, in terms of the balancing of the equities.

I find this law to be appropriate, as an appropriate remedy where the facts bear it out and the facts bore it out here, that we have a public nuisance.

I believe the remedies are such as I said that in a given situation, I would consider the concerns of Mrs. Bennis but I'm cognizant, A, there's another automobile. So, they are not without transportation.

B, I'm cognizant of the fact that there's no costs or there's practically nothing left minus costs in a situation such as this.

In a given case, I might look at a different situation, different car, age of car, value, so forth.

In the situation before me, there's really nothing to be able to be done here but fortunately there's another automobile.

If Mr. Bennis has a speck of decency left to him, let him worry about his transportation and give Mrs. Bennis [194] her automobile.

The vehicle is deemed to be a public nuisance. It shall be abated. It shall be sold. Costs to be deducted and the balance of the monies to the State of Michigan.

We'll take 15 minutes and start the other case.

MR. BEST: Thank you, your Honor.

(End Bennis trial)

* * *

STATE OF MICHIGAN

IN THE CIRCUIT COURT
FOR THE COUNTY OF WAYNE

STATE OF MICHIGAN EX REL JOHN D. O'HAIR,
PROSECUTING ATTORNEY FOR WAYNE COUNTY,
Plaintiff

v. 88-824-379 CZ

JOHN CHARLES BENNIS and TINA B. BENNIS,
Defendant/

ORDER/JUDGMENT

(Filed Nov. 16, 1988)

At a session of said Court held in the City County Building on 16 Nov 88 the Honorable Michael J. Talbot, presiding,

This matter came before this Court pursuant to a Complaint for Abatement of a public nuisance. At the trial of this matter conducted on 2 November 1988, testimony was received from witnesses of the Plaintiff and from TINA B. BENNIS. Based on the testimony presented, in light of the arguments of counsel, and with a full understanding of the statutes and court rules and case law precedents involved in this area,

IT IS HEREBY ORDERED THAT the 1977 Pontiac, jointly owned by JOHN CHARLES BENNIS and TINA B. BENNIS, for those reasons fully stated by this Court on the record made on the trial date, is a public nuisance and that said vehicle shall be abated as provided by the controlling statute.

IT IS FURTHER ORDERED THAT the proceeds derived from the sale of said vehicle pursuant to statute shall be disposed of in the following order of priority: the filing fee of this action shall be returned to the Office of the Wayne County Prosecutor, all police costs shall be paid to the Detroit Police Department, all attorney costs shall be paid to the Office of the Wayne County Prosecutor, any remaining balance shall be paid to the general treasury of the State of Michigan.

/s/ Michael J. Talbot
Hon. Michael J. Talbot

Approved As To Form:

/s/ A. George Best II
A. George Best II
Assistant Prosecuting Attorney

Paul J. Denenfeld
Counsel for Defendants

Order entered pursuant to 7 day rule.

/s/ Illegible

STATE OF MICHIGAN

COURT OF APPEALS

STATE OF MICHIGAN ex rel WAYNE COUNTY PROSECUTING ATTORNEY,

Plaintiff-Appellee,

v

JOHN CHARLES BENNIS and TINA B. BENNIS,

Defendants-Appellants.

July 19, 1993
9:45 a.m.

No. 132568
LC No. 88-824379

Before: Jansen, P.J., and Murphy and Marilyn Kelly, JJ.

MURPHY, J.

Defendants appeal from the judgment of the circuit court declaring their 1977 Pontiac automobile to be a nuisance and abating the nuisance, thereby terminating defendants' interest in the automobile. We reverse.

Defendant John Bennis was convicted of gross indecency in violation of MCL 750.338b; MSA 28.570(2), following an incident in which police officers observed Mr. Bennis engaging in a sexual act with a woman in defendants' 1977 Pontiac. Plaintiff then filed this action, alleging that Mr. Bennis used defendants' car for the purpose of lewdness, assignation or prostitution in violation of MCL 600.3801; MSA 27A.3801, and that the car was therefore a nuisance subject to abatement pursuant to MCL 600.3825; MSA 27A.3825. The circuit court declared the

car to be a nuisance and abated the nuisance, terminating defendants' interest in the automobile.

Defendants first contend that they were entitled to summary disposition pursuant to MCR 2.116(C)(8) because plaintiff failed to demonstrate that defendant Tina Bennis had knowledge that her husband, defendant John Bennis, was using the vehicle that the two jointly owned for purposes of lewdness, assignation, or prostitution. We agree that the prosecution was obligated to demonstrate that defendants knew of the use of the vehicle as a nuisance before the nuisance could be ordered abated.

The statutes relating to public nuisance provide for declaring certain property to be a nuisance where "lewdness, assignation or prostitution or gambling" take place on that property. MCL 600.3801; MSA 27A.3801 provides, in pertinent part:

> Any building, vehicle, boat, aircraft, or place used for the purpose of lewdness, assignation or prostitution or gambling, or used by, or kept for the use of prostitutes or other disorderly persons, . . . is declared a nuisance, . . . and all . . . nuisances shall be enjoined and abated as provided in this act and as provided in the court rules. Any person or his or her servant, agent, or employee who owns, leases conducts, or maintains any building, vehicle, or place used for any of the purposes or acts set forth in this section is guilty of a nuisance.

The prosecuting attorney, among others, is authorized to bring an action for equitable relief to abate a

nuisance pursuant to MCL 600.3805; MSA 27A.3805. MCL 600.3825; MSA 27A.3825 provides for the issuance of an order of abatement and sale of property found to be a nuisance, including vehicles.

MCL 600-3815(2); MSA 27A.3815(2) provides that "proof of knowledge of the existence of the nuisance on the part of the defendants or any of them, is not required." The Michigan Supreme Court, however, has held that, regardless of this statutory language, proof of knowledge is required for abatement. In *People v Shoonmaker*, 241 Mich 177, 181; 216 NW 456 (1927), our Supreme Court stated:

> Defendants did not maintain a nuisance unless they permitted such illegal use of the premises; that is, consented to it or acquiesced, and whether they did so was a question of fact, not established by efforts to prevent misuse of the premises but only by some evidence disclosing permissive use. . . . That transgressions may happen is possible, but remain offenses of the wrongdoer unless tolerated by the occupant to the extent of permissive use of the premises for such purpose or indifference thereto. The statute does not deprive one person of the use of his property by reason of the illegal acts of another, unless the owner's use bears a participating relation to the violation.

Subsequent decisions of our Supreme Court have held that the statute obviates the need for proof of knowledge, and apparently ignore *Schoonmaker*, as noted by this Court in *State ex rel Oakland Co Prosecutor v Motorama Motel Corp*, 105 Mich App 224, 228; 307 NW2d 349 (1981). See *People ex rel Wayne Prosecuting Attorney v Bitonti*, 306

Mich 115, 119; 10 NW2d 329 (plurality) (1943); *People ex rel Wayne Prosecuting Attorney v Tate*, 306 Mich 667, 669; 11 NW2d 282 (1943); *State ex rel Attorney General v Robinson*, 250 Mich 99, 103; 229 NW 403 (1930). The *Schoonmaker* view has recently received support, however, in *State ex rel Wayne Co Prosecuting Attorney v Levenburg*, 406 Mich 455, 462, n 1; 280 NW2d 810 (1979), in which our Supreme Court stated in dicta "However, we acknowledge that a judgment for abatement in a prosecution of this nature cannot be rendered without a finding of knowledge of the accosting and soliciting on the part of the owners or operators of the place found to be a nuisance and their acquiescence in those activities."

Considering that *Shoonmaker* has never been expressly overruled, and in light of the comment in *Levenburg*, we follow the *Schoonmaker* analysis, as this Court did in *Motorama, supra*, and *State ex rel Wayne Prosecuting Attorney v Weitzman*, 21 Mich App 705, 710-711; 176 NW2d 463 (1970). We therefore hold that the prosecutor was required to prove that defendants knew that their vehicle was being used for a purpose set forth in MCL 600.3801; MSA 27A.3801. We further hold that the record in this case does not support a finding that Mrs. Bennis knew that the vehicle was being used for such purpose.

Defendants next contend that the vehicle could not be abated because only one incident of lewdness, assignation, or prostitution was alleged before the trial court, and that this is insufficient to demonstrate a nuisance. We agree. In *Motorama*, the plaintiff alleged that on one occasion, a police officer was accosted and solicited by an unknown female at a bar who then took him across the

street to the defendant hotel. The trial court granted the defendant hotel summary disposition, holding in part that the one instance of lewdness and assignation alleged by the plaintiff was insufficient to support a claim of nuisance. This Court affirmed, holding that a single alleged incident is insufficient to create a nuisance unless circumstances are such that would permit the reasonable inference that the conduct was habitual. *Id.*, 229-230; see also *Bitonti, supra*, 119-120 (Justice Chandler). The facts in *Motorama* were insufficient to permit such an inference, even though the affidavit of the police officer in question stated that there had been numerous arrests of females in that area for solicitation at the bar across from the defendant hotel. *Id.*, 226, 229-230.

The *Motorama* approach best effectuates the purpose of the statute. The abatement statute was enacted to subject houses of prostitution to abatement as nuisances. *State ex rel Wayne Co Prosecutor v Diversified Theatrical Corp*, 396 Mich 244, 246-250; 240 NW2d 460 (1976). The purpose of the act has also been described as eliminating the use of property in connection with gambling, prostitution, and the illicit sale of liquor. *People ex rel Wayne Prosecuting Attorney v Sill*, 310 Mich 570, 575; 17 NW2d 756 (1945); *People ex rel Oakland Prosecuting Attorney v Ginell*, 159 Mich App 679, 681-682; 407 NW2d 59 (1987). The statute is not intended to regulate the morality of individuals, nor to prevent incidents of immorality in, for example, hotels that are otherwise respectable establishments. See *Diversified Theatrical Corp, supra*, 247.

As in *Motorama*, we hold that a single incident is insufficient to establish a nuisance. Further, the circumstances of this case do not permit the reasonable inference

that the conduct was habitual. In this case, the prosecution has alleged only a single incident to support the contention that defendants' car was a nuisance. While the prosecution at length discusses the reputation and record of Kathy Palarchio, the woman found in the car with Mr. Bennis, this does not establish that defendants' car was used on more than that occasion for lewdness, assignation, or prostitution. Similarly, testimony was presented that Mr. Bennis was seen on more than one occasion driving in that area and talking to women. Not only does this observed conduct not prove that defendant was involved in lewdness, assignation, or prostitution, there was no evidence to establish that this conduct, if it occurred, took place in the vehicle in question. In fact, defendants allegedly purchased the car only three weeks before the incident which gave rise to this action.

The dissent in this case states that the transient nature of a vehicle, as compared to real property, justifies finding the vehicle to be a nuisance upon the proof of only one incident of prohibited conduct. The dissent reasons that to require proof that the vehicle was used on more than one occasion for a purpose proscribed by the statute would thwart the purpose of the public nuisance statute. While the prohibited conduct would indeed have to be observed on more than one occasion, that is the very nature of a nuisance. *Motorama, supra,* 229-230. In fact, if conduct happens so rarely that authorities investigating the situation are unable to observe a recurrence of the conduct, we would hesitate to find a nuisance. Just as one incidence of prostitution does not create a brothel out of a family hotel, neither does one isolated incidence of

prohibited conduct in a vehicle necessarily cause the vehicle to be a nuisance.

Defendants further contend that the prosecution failed to demonstrate that an act of lewdness, assignation, or prostitution occurred in the car and that the abatement provisions are therefore inapplicable. We agree. After the incident in question, Mr. Bennis was apparently charged with one court of gross indecency pursuant to MCL 750.338b; MSA 28.570(2).[1] The record indicates that Mr. Bennis was found in the car in an area apparently known for prostitution, engaged in sexual activity with a woman previously arrested for prostitution. Defendant was only charged with gross indecency, however, presumably because there was no proof that the activities in which Mr. Bennis and Ms. Palarchio engaged were in exchange for payment.

Our Supreme Court in *Levenburg* noted that while assignation is generally defined as an appointment for a meeting, especially between lovers, the term as used in the abatement act is limited to the making of an appointment for purposes of prostitution. *Levenburg, supra,* 465-466. Similarly, while lewdness may be defined more

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[1] The complaint alleges that Mr. Bennis was charged with "indecent and immoral conduct." The complaint further alleges that "the observed conduct is a violation of MCLA 750.449a, engaging the services of a prostitute and MCLA 750.338b, gross indecency between male and female." The prosecution agrees in its brief on appeal, however, that defendant John Bennis was charged only with gross indecency, and further admits that there is no evidence that Mr. Bennis paid or intended to pay Ms. Palarchio.

broadly in the common sense of the word, in the abatement act, the term is confined to acts of prostitution. See *Diversified Theatrical Corp, supra,* 246-250. This construction of the terms is sensible, considering that the purpose of the statute is to eliminate repeated prostitution in a specific location. Thus while Mr. Bennis' conduct in his car may have been lewd or may have been an assignation in a general sense, there is no demonstration that the conduct was that prohibited by the statute, absent proof that the sexual activity was in exchange for money.[2]

Reversed.

/s/ William B. Murphy
/s/ Marilyn Kelly

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[2] Nor is Mr. Bennis' conduct included within the nuisance statute merely because his conduct can be equated with gross indecency, and was therefore arguably disorderly. See *Diversified Theatrical Corp, supra,* 246, 250; *State ex rel Oakland Prosecuting Attorney v Alray Northcrest Plaza,* 146 Mich App 595, 602-604; 381 NW2d 731 (1985).

STATE OF MICHIGAN

COURT OF APPEALS

STATE OF MICHIGAN, EX REL JOHN D. O'HAIR, PROSECUTING ATTORNEY FOR THE COUNTY OF WAYNE,

Plaintiff-Appellee,

v

JOHN CHARLES BENNIS and TINA B. BENNIS,

Defendants-Appellants.

No. 132568

LC No. 88-824379 CZ

Before: Jansen, P.J., and Murphy and Marilyn Kelly, JJ.

JANSEN, J. (dissenting).

I respectfully dissent. I would affirm the November 16, 1988, judgment entered by the Wayne Circuit Court declaring defendants' 1977 Pontiac automobile to be a nuisance and abating their interest in the automobile.

Defendants contend that the trial court erred in denying their motion for summary disposition brought pursuant to MCR 2.116(C)(8). Specifically, defendants argue that plaintiff's complaint failed to allege more than one isolated instance of using the 1977 automobile for purposes of lewdness, assignation, or prostitution and, the complaint failed to allege knowledge of, consent to, or acquiescence in the alleged nuisance by Tina Bennis. I disagree with defendants.

A motion for summary disposition based on a failure to state a claim upon which relief may be granted is to be tested by reference to the pleadings alone, and all well-pled material allegations must be taken as true. *State ex rel Oakland County Prosecutor v. Motorama Motel Corp*, 105 Mich App 224, 226; 307 NW2d 349 (1981). The standard is whether the plaintiff's claims are so clearly unenforceable as a matter of law that no factual development could possibly justify a right to recovery. *Id.*

Defendants maintain that plaintiff's complaint was insufficient because it failed to allege that Tina Bennis had knowledge of, consented to, or acquiesced in the use of the automobile by her husband to create a nuisance. The majority held that "the prosecution was obligated to *demonstrate* that defendants knew of the use of the vehicle as a nuisance before the nuisance could be ordered abated." (Emphasis added.) I disagree.

It is not disputed that Tina Bennis and John Bennis are co-titled owners of the 1977 automobile. MCL 600.3815(2); MSA 27A.3815(2) specifically and unambiguously provides that "[p]roof of knowledge of the existence of the nuisance on the part of the defendants or any of them, is not required." The statute expressly obviates the necessity of proof of knowledge of the existence of the nuisance on the part of defendants. *People ex rel Wayne Prosecuting Attorney v Bitonti*, 306 Mich 115, 119, 121; 10 NW2d 329 (1943); *State ex rel Attorney General v Robinson*, 250 Mich 99, 103; 229 NW 403 (1930). But see *People v Schoonmaker*, 241 Mich 117; 216 NW 456 (1927); *State ex rel Wayne Prosecuting Attorney v Weitzman*, 21 Mich App 705; 176 NW2d 463 (1970). "Obviously, where proof of knowledge is unnecessary, allegations of the

owner's knowledge are not required to state a statutory cause of action." *State ex rel Oakland County Prosecutor v Weaver*, 74 Mich App 462, 464; 254 NW2d 68 (1977).

I recognize that our Supreme Court has held, as noted by the majority, that proof of knowledge is required for abatement. *Schoonmaker, supra*. However, I also recognize that subsequent decisions of the Supreme Court have held that the statute, MCL 600.3815(2); MSA 27A.3815(2), obviates the need for proof of knowledge. *Bitonti, Robinson, supra*. See also *People ex rel Wayne Prosecuting Attorney v Tate*, 306 Mich 667, 669; 11 NW2d 282 (1943). Given the clear, unambiguous language of the statute, I am convinced that *Bitonti, Tate, Robinson*, and *Weaver* are correct. I would hold that plaintiff was not required to allege knowledge on the part of Tina Bennis.

Defendants also claim that plaintiff failed to allege more than one isolated instance of use of the 1977 automobile for the purpose of lewdness, assignation, or prostitution. I would hold that plaintiff was not required to allege more than one use of the vehicle for the purposes proscribed in the statute.

Because of the unique characteristics of an automobile, and in particular the mobility of such, I would follow the opinion of Justice Bushnell in *Bitonti, supra*. In *Bitonti*, the Court held "that proof of only one isolated instance of violation of the statute was sufficient." *Id.*, p 122. I am convinced that this is the proper interpretation to be given the public nuisance statute when a vehicle is used for the purpose of lewdness, assignation, or prostitution. The statute specifically provides that any vehicle used for the purpose of lewdness, assignation, or

prostitution is declared a nuisance. MCL 600.3801; MSA 27A.3801. The statute does not require protracted use of the vehicle for purposes of lewdness, assignation, or prostitution, and in a case such as this, where the automobile is used as an indispensable part of the statutory violation, I would hold that a single incident is sufficient to sustain a finding of nuisance.

I am mindful that cases such as *Motorama Motel Corp* have held that a "nuisance involves the notion of repeated or continuing conduct and should not be based upon proof of a single isolated incident unless the facts surrounding the incident permit the reasonable inference that the prohibited conduct was habitual in nature." *Id.*, pp 229-230. However, *Motorama Motel Corp* involved a police officer who was accosted and solicited by a female at the Last Chance Bar and was then taken across the street to the defendant motel by the female. *Id.*, p 225. The officer's affidavit indicated that the motel was only utilized on a single occasion. *Id.*, p 230.

Given the obvious and inherent differences between a stationary or fixed building or structure and a transient or mobile vehicle, it is my opinion that the better reasoned rule allows a finding of public nuisance based on a single instance of conduct involving the use of a vehicle for this purpose of lewdness, assignation, or prostitution. A building or fixed structure may be subject to continuous surveillance for the purpose of determining whether the premises are continuously or repeatedly being used for the purpose of lewdness, assignation, or prostitution. However, when a vehicle is used for any of the purposes set forth in MCL 600.3801; MSA 27A.3801, the authorities would have to determine that the same car was being

used on a continuous or repeated basis for purposes proscribed by the statute. Because of the mobility of a vehicle, this would surely be a prohibitive task.

As the majority notes, the purpose of the statute is to eliminate the use of property in connection with gambling, prostitution, and the illicit sale of liquor. *People ex rel Wayne Prosecuting Attorney v Sill* 310 Mich 570, 575; 17 NW2d 756 (1945); *People ex rel Oakland Prosecuting Attorney v Ginell*, 159 Mich App 679, 681-682; 407 NW2d 59 (1987). To require plaintiff to prove that the same vehicle was used on numerous occasions for purposes proscribed by the statute would thwart the purpose behind the public nuisance statute.

Defendants also argued that the trial court erred in finding that a public nuisance existed where the evidence failed to show; that John Bennis engaged in more than one isolated instance of proscribed conduct. Defendants further argue that there was no evidence presented to establish that Bennis paid Palarchio for performing the sexual act and that the conduct between Bennis and Palarchio was consensual.

As I have stated above, it is my opinion that when a vehicle is used for the purpose of lewdness, assignation, or prostitution, proof of a single instance of conduct will support a finding that the vehicle constitutes a public nuisance pursuant to MCL 600.3801; MSA 27A.3801. Additionally, I am convinced that sufficient evidence was presented to establish that the vehicle was used for the purpose of lewdness, assignation, or prostitution.

In *State ex rel Macomb Prosecuting Attorney v Mesk*, 123 Mich App 111; 333 NW2d 184 (1983), this Court noted

that the Supreme Court, in *State ex rel Wayne Prosecuting Attorney v Diversified Theatrical Corp*, 396 Mich 244; 240 NW2d 460 (1976), found the meaning of the terms lewdness, assignation, and prostitution, as used in the abatement statute, to be clear. *Mesk*, p 116. Although the Court in *Diversified Theatrical Corp* did not expressly define the terms, it quoted from *Chicago v Geraci*, 30 Ill App 3d 699, 703; 332 NE2d 487 (1975), as follows:

> However, we find no confusion in the meaning of these terms. Although traditionally the term "lewdness" is viewed as being broader than and including the term "prostitution," such terms refer to the same general class of activities which are normally associated with houses of prostitution (or whatever such establishments may be called). They are intended to designate and prohibit sex acts of whatever nature which are performed for money. 396 Mich 250, fn 13. [*Mesk*, p 116.]

The majority states that John Bennis was apparently only charged with one count of gross indecency, MCL 750.3386; MSA 28.570(2), "presumably because there was no proof that the activities in which Mr. Bennis and Ms. Palarchio engaged were in exchange for payment." However, a review of plaintiff's complaint reveals that Bennis and Palarchio were arrested and charged with indecent and immoral conduct, specifically, engaging the services of a prostitute, MCL 750.449a; MSA 28.704(1), and gross indecency between male and female persons, MCL 750.3386; MSA 28.570(2).

Testimony indicated that on March 3, 1988, John Bennis was driving home from work in the 1977 Pontiac automobile. Bennis stopped the car at the corner of Eight

Mile and Sheffield where a young woman, Palarchio, was standing. At the time Bennis stopped his vehicle, he was being observed by two Detroit Police Officers who were working undercover for the vice squad.

Prior to Bennis stopped his vehicle, the officers observed Palarchio "flagging" cars in an effort to get them to stop. When Bennis stopped his vehicle, Palarchio walked to the passenger's side and entered the car. Bennis drove down the street, made a U-turn, pulled along the road and stopped, turning off his headlights.

The officers followed Bennis in his vehicle, and they parked approximately three car lengths behind the 1977 Pontiac. Officer Anthony testified that he say two heads in the car, a female head on the right side and a male head on the left. Immediately after the officers parked their vehicle, the female head disappeared towards the driver's side of the car. The officers approached the vehicle and observed Palarchio performing an act of fellatio on Bennis.

Officer Anthony testified that it was a known fact that Palarchio has been working as a prostitute. She had been arrested many times before on charges of accosting and soliciting, indecent and obscene conduct, and disorderly conduct. Palarchio has also been arrested for "flagging" vehicles in an attempt to get them to stop.

I would find that the above evidence was sufficient to support a finding that John Bennis used his vehicle for the purpose of lewdness, assignation, or prostitution. The trial court could properly infer from all of the evidence presented that John Bennis, whole occupying the 1977 Pontiac, engaged the services of Palarchio for the purpose

of engaging in lewdness, assignation, or prostitution. Clearly, prostitution includes an act of fellatio. *Mesk*, p 117.

Additionally, the trial court did not err by ordering abatement of the vehicle and extinguishing the proprietary interest of the innocent spousal co-owner, Tina Bennis. As noted above, MCL 600.3815(2); MSA 27A.3815(2) obviated the requirement of proof of a defendant's knowledge of the existence of the nuisance. *Tate, Bitonti, Robinson, Weaver, supra*. Plaintiff was not required to show knowledge on the part of Tina Bennis.

I would affirm the judgment of the trial court declaring defendants' 1977 Pontiac automobile to be a nuisance and abating their interest in the automobile.

/s/ Kathleen Jansen

Opinion

FILED DECEMBER 29, 1994

PEOPLE OF THE STATE OF MICHIGAN ex rel WAYNE COUNTY PROSECUTOR,

Plaintiff-Appellant,

No. 97339

v

JOHN C. BENNIS and TINA B. BENNIS,

Defendants-Appellees.

BEFORE THE ENIRE BENCH

RILEY, J. In this case, we are required to construe various aspects of the nuisance abatement statute, MCL 600.3801; MSA 27A.3801.[1] Specifically, we must decide

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[1] Any building, vehicle, boat, aircraft, or place used for the purpose of lewdness, assignation or prostitution or gambling, or used by, or kept for the use of prostitutes or other disorderly persons, or used for the unlawful manufacture, transporting, sale, keeping for sale, bartering, or furnishing of any controlled substance as defined in section 7104 of the public health code, Act No. 368 of the Public Acts of 1978, being section 333.7104 of the Michigan Compiled Laws, or of any vinous, malt, brewed, fermented, spirituous, or intoxicating liquors or any mixed liquors or beverages, any part of which is intoxicating, is declared a nuisance, and the furniture, fixtures, and contents of the building, vehicle, boat, aircraft, or place and all intoxicating liquors therein are also declared a nuisance, and all controlled substances and nuisances shall be enjoined and abated as provided in this act and as provided in the court rules. Any

whether an act of prostitution was consummated absent proof that money was exchanged. Next, we must determine whether the trial court erred in abating a vehicle used to commit an act of prostitution in a neighborhood with a reputation for illicit activity. Finally, we must consider whether a co-owner's interest in a vehicle may be abated where the co-owner allegedly had no knowledge that the vehicle was used in proscription of the statute.

We would hold that lewdness, incidental to an act of prostitution, is activity squarely within the purview of the nuisance abatement statute. Alternatively, we conclude that proof of an exchange of money is not necessary where, as here, it is clear from the totality of circumstances that the sexual act was in exchange for payment. Additionally, we would uphold the abatement of this vehicle because the defendant entered a neighborhood that is a known place for prostitution and used his vehicle to engage in illicit activity, thereby contributing to the existing nuisance. Finally, pursuant to the clear and unambiguous language of the statute, we would hold that knowledge or consent is not required to abate the interest of a co-owner.

I

John Bennis was arrested for gross indecency on the evening of October 3, 1988. On that evening, Detroit

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person or his or her servant, agent, or employee who owns, leases, conducts, or maintains any building, vehicle, or place used for any of the purposes or acts set forth in this section is guilty of a nuisance.

police officers Jacob Anthony and John Howe set up surveillance after they witnessed a woman "flagging"[2] passing vehicles on the corner of Eight Mile and Sheffield. The woman was later identified as Kathy Polarchio. The officers next observed a 1977 Pontiac, driven by a man, later identified as John Bennis, turn onto Sheffield and stop near Ms. Polarchio, who approached and entered the passenger side of the Pontiac. The officers followed the Bennis vehicle, which proceeded a block, made a U-turn, and stopped. Surveillance continued until the officers noticed Ms. Polarchio's head disappear toward the driver's side of the Pontiac. The officers immediately approached the Bennis vehicle, shined a flashlight into the front seat, and witnessed Ms. Polarchio performing an act of fellatio on Mr. Bennis.

Mr. Bennis was convicted of gross indecency in violation of MCL 750.338b; MSA 28.570(2).[3] The Wayne County prosecutor then filed a complaint alleging that the Bennis vehicle was a public nuisance subject to abatement pursuant to MCL 600.3801; MSA 27A.3801. The vehicle was co-owned by Mr. Bennis' wife, Tina Bennis, who claimed that she had no knowledge that her husband ever used their vehicle in violation of the statute. The trial judge held that the vehicle was a nuisance and abated the interest of defendant and his wife.

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[2] "Flagging" is the manner in which prostitutes solicit business from potential customers in passing vehicles.

[3] Ms. Polarchio was arrested the next day for accosting and soliciting. She had formerly been arrested on several occasions for disorderly conduct, accosting and soliciting, and indecent and obscene conduct.

The Court of Appeals reversed the decision of the trial court,[4] holding first that the prosecution had an obligation under *People v Schoonmaker*, 241 Mich 177; 216 NW 456 (1927), to demonstrate that Mr. Bennis' wife knew that he used the vehicle in a manner proscribed by the statute and failed to offer such proof.[5] The Court of Appeals next held that under *State ex rel Oakland Co Prosecutor v Motorama Motel Corp*, 105 Mich App 224; 307 NW2d 349 (1981), proof of a single incident of lewdness, assignation, or prostitution is insufficient to establish a nuisance. Finally, the Court of Appeals held that the prosecution failed to demonstrate that an act of lewdness, assignation, or prostitution occurred.

We granted leave to appeal[6] and now reverse the decision of the Court of Appeals.

II

We turn first to whether the act committed in the Bennis vehicle is within the purview of the nuisance abatement statute. Consistent with the 1909 Iowa "red light abatement acts," upon which the Michigan statute is based,[7] the Michigan statute requires that the act be one

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[4] 200 Mich App 670; 504 NW2d 731 (1993).

[5] *Schoonmaker* was based on a predecessor statute, 1925 PA 389; however, the relevant language is virtually identical to the present statute. See n 24.

[6] 445 Mich 861 (1994).

[7] *State ex rel Wayne Co Prosecutor v Diversified Theatrical Corp*, 396 Mich 244, 246; 240 NW2d 460 (1976).

of "lewdness, assignation *or* prostitution."[8] In *State ex rel Wayne Co Prosecuting Attorney v Levenburg*, 406 Mich 455; 280 NW2d 810 (1979), this Court used the rule of construction, *noscitur a sociis*, to define assignation in the statute.[9] The Court upheld the abatement of a bar because it was used for accosting and soliciting acts of prostitution. In other words, "the making of an appointment for the purpose of prostitution" constituted assignation under the statute. *Id.* at 466. *Levenburg* based its decision on *State ex rel Wayne Co Prosecutor v Diversified Theatrical Corp*, 396 Mich 244, 246-250; 240 NW2d 460 (1976). *Diversified* essentially held that while lewdness, assignation, and prostitution are set forth in the alternative, the conduct constituting lewdness or assignation must be incidental to or in furtherance of an act of prostitution.[10]

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[8] See n 1 (emphasis added).

[9] The doctrine should be applied where legislative intent is not clear, so that "when two or more words are grouped together, and ordinarily have a similar meaning, but are not equally comprehensive, the general word will be limited and qualified by the special word." 2A Singer, Sutherland Statutory Construction (5th ed), § 47.16, p 183. See also *Williams & Works, Inc v Springfield Corp*, 408 Mich 732, 746; 293 NW2d 304 (1980).

[10] *Diversified* relied on *State v Morley*, 63 NM 267, 270-271; 317 P2d 317 (1957), which stated "we are led to believe that the legislature intended 'lewdness' to be limited to acts in connection with 'assignation' or 'prostitution' " and further noted that "[t]he term 'lewdness' is a broader and more general term than 'assignation' or 'prostitution.' " See also *State ex rel Oakland Prosecuting Attorney v Ginell*, 159 Mich App 679, 681; 407 NW2d 59 (1987), in which the Court of Appeals held that the activity must not be consensual in nature, whether lewd, obscene, or disorderly; *State ex rel Wayne Co Prosecuting Attorney v Dizzy Duck*, 203 Mich App 250, 260; 511 NW2d 907 (1994), where the

In the instant case, the prosecution maintains that an act of lewdness, within the context of the nuisance abatement statute, occurred. Although this aspect of the statute has yet to be defined,[11] we agree with the contention put forth by the prosecution.

We analogize the definition of "assignation" in *Levenburg* with the definition we now give to "lewdness." *Levenburg* looked to the common meaning of "assignation" and concluded that the common definition of the term is limited to those instances in which the act of assignation is "for the purpose of prostitution." *Id.* at 466. In this manner, the common definition of "lewdness" includes a lustful and obscene display of illicit sexual activity.[12] Utilizing the common meaning of "lewdness,"[13] we also conclude that it is limited to those

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Court of Appeals concluded that lewdness "as used in the nuisance abatement statute, refers to those sexual acts . . . performed on another where done for hire."

[11] In *Diversified*, we did not define lewdness, but simply held that no interest was abatable because the conduct was unrelated to live acts of prostitution on the premises.

[12] See also 50 Am Jur 2d, Lewdness, Indecency, Etc, § 1, pp 450-451:

> Lewdness has been defined as the unlawful indulgence of lust. It signifies that form of immorality which has relation to sexual impurity, and is generally used to indicate gross indecency with respect to the sexual relations. Illicit intercourse may under some circumstances constitute lewdness, but there may also be lewdness without any such act.

[13] The *Random House College Dictionary of the English Language: Unabridged Edition* defines "lewd" as:

> 1. inclined to, characterized by, or inciting to lust or lechery; lascivious. 2. obscene or indecent, as

instances in which an act of lewdness occurs in furtherance of or for the purpose of prostitution.

This result is consistent with Michigan decisions in *Diversified* and *Levenburg, supra*, as well as other jurisdictions interpreting similar language.[14] For example, in *Pennsylvania v MacDonald*, 464 Pa 435, 460-461; 347 A2d 290 (1975), the court addressed the issue of lewdness and concluded:

> Far more important than mere dictionary definitions is the statutory context in which the word "lewdness" appears. . . . That context proscribes use of any building "for the purpose of fornication, . . . assignation, and/or prostitution." All of these forbidden purposes involve illicit sexual *conduct*, thus strongly indicating a legislative intention to proscribe only purposes of this type when it used the word "lewdness." Such a construction has the further advantage of obviating any problems of vagueness which might be entailed by construing the term "lewdness" in a broader fashion. [Emphasis supplied.]

In the case at bar, Mr. Bennis' conduct constitutes lewdness because it occurred in a residential neighborhood and was in furtherance of an act that traditionally forms the basis of a prostitution charge, i.e., fellatio.[15]

> language or songs; salacious. 3. Obs. a. low, ignorant, or vulgar. b. base, vile, or wicked, esp. of a person. c. bad, worthless or poor, esp. of a thing.

[14] See *Levenburg* and *Diversified* and cases cited therein.

[15] We do not decide whether property may be abated for an act of lewdness where the conduct is not that which traditionally forms a charge of prostitution.

This result is consistent with the definition of assignation in *Levenburg, supra,* at 466. Indeed, we find particularly persuasive the fact that Mr. Bennis engaged in this act with a known prostitute in an area reputed for illicit activity.[16] Therefore, while no money was exchanged, the conduct clearly satisfies statutory requirements and is subject to abatement.

Moreover, even if we did not find the conduct lewd within the meaning of the nuisance abatement statute, we are persuaded that from the totality of the circumstances, an act of prostitution occurred. We primarily rely on the uncontroverted testimony of Detroit police officer Jacob Anthony who, along with his partner, witnessed Ms. Polarchio "flagging"[17] passing vehicles on Eight Mile and Sheffield. His testimony is a compelling indication that an act of prostitution occurred. As previously stated, the officers witnessed the Bennis vehicle stop in response to Ms. Polarchio's "flagging" and saw her enter the vehicle posthaste. The vehicle proceeded and within minutes again came to a stop. Ms. Polarchio's head immediately disappeared, and the officers then observed the two engaged in fellatio. The dissent fails to address this most persuasive testimony.

We are additionally persuaded by the following facts which support our conclusion. One witness, Sammie Parham, a security guard at a business located at Six Mile and Woodward, testified that he had seen Mr. Bennis in

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[16] The record is devoid of any evidence that Mr. Bennis raised in his defense that this activity was consensual or that he and Ms. Polarchio had some prior relationship.

[17] See n 2.

the area during the summer before Bennis' October 3, 1988, arrest. Mr. Parham saw Mr. Bennis talking to a prostitute on two separate occasions and ushered the prostitutes away in both instances just as they were about to enter the Bennis vehicle.

Furthermore, it is uncontested that Ms. Polarchio had been arrested several times for solicitation and disorderly conduct. The arresting officer testified that Mr. Bennis stopped at the waving, or what he perceived to be the "flagging," by Ms. Polarchio. Additionally, we are persuaded by Mr. Bennis' admission at trial that he normally proceeds home across Eight Mile and turns north onto Woodward. It is uncontested that on the evening in question, Mr. Bennis drove down Eight Mile and proceeded *south* on Sheffield, the opposite direction of his home. It is also undisputed that minutes after he turned onto Sheffield and picked up Ms. Polarchio, two officers found them engaged in fellatio.

While the officers did not actually witness an exchange of money, from the testimony elicited at trial, a clear inference may be drawn that the sexual act was in exchange for monetary compensation. In his defense, Mr. Bennis has not asserted that he and Ms. Polarchio had a relationship or even knew one another, precluding any inference that the act was consensual, rather than for hire. We do not shift the burden of proof to defendant on this issue. We clearly have sufficient testimony on the record which supports that an act of prostitution occurred. We merely find it noteworthy that, as a matter of fact, Mr. Bennis has not asserted in his defense that there was a prior or existing relationship between himself and Ms. Polarchio.

In sum, we are persuaded by the testimony of the officer witnessing the act and the stated additional facts that augment our decision. Under these circumstances, proof of an actual exchange of money is not required. An action will not be denied merely because the witnessing officers do not allow the illicit activity to proceed to the point where money is exchanged. We therefore conclude that the Court of Appeals erred in holding that the prosecution failed to demonstrate that an act of lewdness, assignation, or prostitution occurred in the Bennis vehicle.

III

As noted above, MCL 600.3801; MSA 27A.3801 provides for the abatement of a vehicle used for the purpose of lewdness, assignation, or prostitution. However, the statute does not define the extent of activity required to constitute a nuisance. Therefore, we must next determine whether an act of prostitution committed in a neighborhood known for illicit activity is within the purview of the statute.

A

Although the issue has not been resolved by appellate decisions of this state, an attempt was made to clarify the definition of nuisance in *Motorama Motel, supra.* Citing *People ex rel Wayne Prosecuting Attorney v Bitonti,* 306 Mich 115; 10 NW2d 329 (1943), *Motorama* held that "[a] nuisance involves the notion of repeated or continuing conduct and should not be based upon proof of a single

isolated incident unless the facts surrounding that incident permit the reasonable inference that the prohibited conduct was habitual in nature." *Id.* at 229-230. However, *Motorama's* reliance on *Bitonti* is belied by the fact that only four of the eight justices in *Bitonti* held that a single act was sufficient to constitute an abatable nuisance.[18]

As a result, existing Michigan precedent does not specifically require more than a single incident of conduct. However, cognizant of the activity that has implicitly constituted a nuisance in previous actions,[19] we must

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[18] Four justices held that a single act was sufficient, three held it was not, and one concurred in the reversal of the abatement but "without expressing the opinion that proof of a single violation would be insufficient to establish the existence of a nuisance under all circumstances." *Id.* at 120.

[19] We acknowledge that many abatement cases in this state based on identical predecessor statutes involved a nuisance where more than a single act of conduct was proved or could be inferred. *People ex rel Wayne Prosecuting Attorney v Sill,* 310 Mich 570, 572; 17 NW2d 756 (1945), abated the interest of a vehicle where proof was submitted that the owner was engaged in the "numbers racket" and had in his possession a number of betting slips. *State ex rel Wayne Prosecuting Attorney v Martin,* 314 Mich 317, 322; 22 NW2d 381 (1946), held that "[t]he testimony of defendant would of itself be a sufficient basis for the court's finding that defendant had used the automobile in question on the very day of his arrest and the preceding day for the illegal purposes [gambling] claimed by plaintiff" and therefore was abatable pursuant to the nuisance abatement statute. *Levenburg, supra* at 466-467, upheld the abatement of a Detroit bar where there was testimony that prostitutes frequently solicited customers to perform sexual acts elsewhere. In *State ex rel Macomb Co Prosecuting Attorney v Mesk,* 123 Mich App 111, 123; 333 NW2d 184 (1983), the Court relied on *Motorama,* requiring that the prosecution establish that the nuisance was continuing in

determine whether the activity in this case properly falls within the definition of nuisance as used in MCL 600.3801; MSA 27A.3801.

B

Because the public nuisance statute allows the abatement of property used in a proscribed manner without specifying the activity that will constitute a nuisance, we are aided in the definition of a nuisance by general public nuisance law. This Court has defined a public nuisance as involving "not only a defect, but threatening or impending danger to the public. . . . " *Kilts v Kent Co Bd of Supervisors*, 162 Mich 646, 651; 127 NW 821 (1910). Similarly, this Court has declared a public nuisance where an act "offends public decency." *Bloss v Paris Twp*, 380 Mich 466, 470; 157 NW2d 260 (1968).[20] Finally, *Garfield Twp v Young*, 348 Mich 337, 342, 82 NW2d 876 (1957), held that to constitute a nuisance

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nature. A continuing nuisance was established where four undercover police officers made separate visits to a massage parlor over a nine-month period and each time a model agreed to perform sexual services.

[20] In *Bloss, supra*, this Court upheld the lower court's injunction of the operation of an outdoor theater showing explicit movies where neighborhood children could view the films from outside the drive-in. *Id.* at 468-469. The Court held: "It is our judgment that the foisting off of a display of pictures not fit for children to see onto places within their view on public streets, on residential properties and in private homes, without the consent of the property owners and the parents, is a public nuisance." *Id.* at 470.

> the activity must be harmful to the public health, or create an interference in the use of a way of travel, or affect public morals, or prevent the public from the peaceful use of their land and the public streets. [Citations omitted.]

The rationale is that a nuisance involves a continuing detrimental effect on the public. The nuisance abatement statute serves the same general purpose. Therefore, mindful of the activity that generally constitutes a public nuisance, we apply these principles to the context of the nuisance abatement statute.

C

In construing the nuisance abatement statute, "effect must be given, if possible, to every word, sentence and section." *Grand Rapids v Crocker*, 219 Mich 178, 182; 189 NW 221 (1922). Moreover, to discover the legislative intent, "the entire act must be read, and the interpretation to be given to a particular word in one section arrived at after due consideration of every other section so as to produce, if possible, a harmonious and consistent enactment as a whole." *Id.* at 182-183. However,

> [w]here the language of a statute is of doubtful meaning, a court must look to the object of the statute in light of the harm it is designed to remedy, and strive to apply a reasonable construction that will best accomplish the Legislature's purpose. [*Marquis v Hartford Accident & Indemnity*, 444 Mich 638, 644; 513 NW2d 799 (1994) (citations omitted).]

Pursuant to these rules of construction, we consider MCL 600.3815; MSA 27A.3815 in our analysis of whether an abatable nuisance exists. The section provides:

> In any action brought under this chapter, evidence of the general reputation of the building, vehicle, boat, aircraft *or* place is admissible for the purpose of proving the existence of the nuisance. [Emphasis added.]

The nuisance abatement statute's use of the disjunctive "or" allows us to consider the reputation of the vehicle *or* the place to determine whether a nuisance exists. The *Random House College Dictionary* defines "place" as "an open space, or square, in a city or town," "a short street, court," and "an area of habitation, as a city, town, or village." Given the unique facts in this case, we focus on the word "place" set forth in MCL 600.3815(1); MSA 27A.3815(1). We conclude that the word "place" may encompass a neighborhood, and we therefore consider the general reputation of the area surrounding the Eight Mile and Sheffield intersection for purposes of determining the existence of a nuisance.[21]

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[21] See *State ex rel Wayne Co Prosecuting Attorney v Bernstein*, 57 Mich App 204, 206; 226 NW2d 56 (1974), upholding the abatement of a bar under M.C.L. 600.3801; M.S.A. 27A.3801 where "officers testified to numerous arrests for accosting and soliciting, and to the general reputation of the Vernor Bar as a place where the services of a prostitute can easily be obtained." See also *People v Lee*, 307 Mich 743, 753; 12 NW2d 418 (1943), upholding admission of testimony of three witnesses about the "general reputation in the vicinity" of a house of prostitution in an action to convict the owner of the house.

Several members of that neighborhood testified about numerous incidents where they had personally been accosted and solicited. The arresting officer confirmed that many arrests for prostitution were made in that neighborhood. Several neighbors testified that they had been solicited on more than one occasion. One witness testified that he had observed acts of prostitution near the corner of Eight Mile and Gardendale and that on one occasion he found his young son staring at strange vehicles parked near that corner in which men and women were apparently committing acts of prostitution. These incidents reflect concerns identical to those cited in *Garfield* and *Bloss*, *supra*.

Thus, the present case involves a condition that, on the basis of the record below, is a public nuisance in this neighborhood. It cannot be contested that a significant threat to public peace and safety exists in the Eight Mile and Sheffield neighborhood. Vehicles that enter the neighborhood in order to solicit acts of prostitution are being "used for" the continuance of this nuisance. Therefore, we would hold that the nuisance abatement statute allows the abatement of a vehicle where the driver entered into and thereby contributed to an existing condition that is a public nuisance.[22]

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[22] We note that our position is limited to situations in which a nuisance condition exists, regardless of the city. Therefore, a vehicle could not be abated if the same situation arose in another area of Detroit, such as Palmer Woods, where certainly no such nuisance condition exists.

D

This remedy is also buttressed by our review of the overall objective of the nuisance abatement statute. We note that in 1988, minor changes were made to the statute.[23] It appears clear from the amendment that the Legislature intended to remedy the inevitable decline of vice-laden neighborhoods. In the amendment, references to "narcotic and/or hypnotic drug" were changed to the broader and more encompassing phrase, "controlled substance." The arguments presented in support of the amendment stated: "Dope houses are a plague upon the city neighborhoods in which they occur. Drug trafficking, violent crime, and theft endanger and disrupt the lives of law-abiding citizens. The appearance of dope houses can put an entire neighborhood into decline."[24]

The legislative objective was also addressed in *People ex rel. Wayne Prosecuting Attorney v Sill*, 310 Mich 570; 17 NW2d 756 (1945). In *Sill*, this Court held that the purpose of the nuisance abatement statute[25] was "to eliminate

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[23] The 1988 amendment was in effect when the act occurred in the Bennis vehicle.

[24] House Legislative Analysis, HB 4317, May 13, 1987.

[25] The present statute is almost identical to its predecessor on which the *Sill* case is based. The statute read as follows:

> Any building, vehicle or place used for the purpose of lewdness, assignation or prostitution or gambling, or used by, or kept for the use of prostitutes or other disorderly persons, or used for the unlawful manufacture, storing, possessing, transporting, sale, keeping for sale, giving away, bartering, furnishing or otherwise disposing of any vinous, malt, brewed, fermented, spirituous or intoxicating liquors or any mixed liquors or beverages, any part of which is intoxicating, is hereby declared a nuisance and the furniture, fixtures and contents of any such building, vehicle or place, and all such intoxicating liquors therein are also declared a nuisance, and all such nuisances shall be enjoined and abated as hereinafter provided. Any person, or his servant, agent or employe who shall own, lease, conduct or maintain any building, vehicle or place used for any of the purposes or by any of the persons above set forth or where any of the acts above enumerated are conducted, permitted or carried on, is guilty of a nuisance. [1929 CL 9093. Cf. n 1.]

effectively, by statutory procedure, the use of property, real or *personal*, in connection with gambling, *prostitution*, and illicit sale of liquor. . . . " *Id.* at 575 (emphasis added). Similarly, *State ex rel Wayne Co Prosecuting Attorney v Bernstein*, 57 Mich App 204, 208; 226 NW2d 56 (1974), held that "[t]he padlock law is designed to facilitate the elimination of certain situations which have been found to interfere with a substantial community interest." Thus, we believe that our position is consistent with the intent of the Legislature.

E

Moreover, the holding in *State ex rel. Attorney General v Robinson*, 250 Mich 99; 229 NW 403 (1930), is analogous to our position in the present case and conclusively persuades us that we have achieved a remedy consistent with the legislative intent. In *Robinson*, *one* apartment in a fifty-unit building was abated where proof of a *single* incident of prostitution was submitted. A police officer witnessed a solicitation by a prostitute and the entry of

the apartment to commit the act. Although there was proof of only one act of prostitution in the abated apartment, this Court considered the general reputation of the building and the fact that the woman pleaded guilty to charges of prostitution and concluded that "the nuisance use of the premises . . . can be found without drawing on the imagination." *Id.* at 104.

The dissent maintains that reliance on *Robinson* is misplaced. The dissent's recitation of the facts of *Robinson*, however, only confirms that it is persuasive authority for the proposition that a single act sufficiently constitutes a nuisance where a larger nuisance condition exists. The dissent correctly states: "A police officer witnessed *a* solicitation outside the building, watched two persons go into the building, and arrested the pair when they came out of the building." *Post*, p 746 (emphasis added). It is vital to note that ultimately the *only* apartment abated was the one in which a *single* act of prostitution occurred. Further, it was only abated after consideration of the reputation of the larger nuisance condition existing in the building itself, which *could not* be abated in that case.

As previously stated, the nuisance abatement statute has remained virtually unchanged since *Robinson*, and our position therefore would apply a priori to the present case. The one act of prostitution in *Robinson* was considered with regard to the general reputation of the entire building. Similarly, the one act of nuisance by Mr. Bennis in his vehicle must be viewed in light of the larger and continuing nuisance occurring in the neighborhood. Where testimony surrounding proof of an incident of

prostitution unequivocally establishes that the neighborhood has a reputation for prostitution, the property contributing to the continuance of the nuisance may be abated pursuant to the statute. To hold otherwise would allow the criminal actors to circumvent the statute where a different vehicle was used in the commission of each offense. The result would permit the continuing blight of neighborhoods, contrary to the clear intent of the statute. Accordingly, we would hold that the Court of Appeals erred in concluding that the act of prostitution occurring in the Bennis vehicle in a neighborhood known for prostitution was not an abatable nuisance.

IV

Finally, we consider whether a co-owner's interest in a vehicle may be abated where the co-owner had no knowledge that the vehicle was used in a manner proscribed by the nuisance abatement statute. Despite the clear and unambiguous language of the statute indicating that a property owner's knowledge or consent is not required,[26] decisions of this state have nonetheless reached different conclusions with respect to this issue. We would resolve the conflict and would hold that knowledge is not required.

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[26] "Proof of knowledge of the existence of the nuisance on the part of the defendants or any of them, is not required." MCL 600.3815(2); M.S.A. 27A.3815(2). The language is nearly identical to the original language of the public nuisance statute: "Proof of knowledge of the existence of such nuisance on the part of the defendants or any of them, shall not be required." 1925 PA 389, § 9.

A

The schism has its underpinnings in *Schoonmaker, supra,* a pre-1988 case. *Schoonmaker* seemingly required proof of an owner's consent to the illegal use of the property to be abated. The clear language of the nuisance abatement statute abrogates the requirement of knowledge.[27] In *Schoonmaker,* certain illegal acts were committed by people attending a dance hall. However, those acts were not committed inside the dance hall; instead, patrons consumed intoxicating liquor outside the hall. In this manner, all proscribed activity was divorced from the property sought to be abated. The property itself was not in any way used to facilitate the proscribed act, unlike the set of facts before us.

On the basis of these facts, it appears that Justice WIEST in *Schoonmaker* did not intend a result inconsistent with the nuisance abatement statute. Additionally, it is apparent that Justice WIEST did not intend to contradict the provision of the abatement statute because only three years later in *Robinson, supra* at 103, Chief Justice WIEST concluded that the statute "expressly obviates need of knowledge on the part of the owner of nuisance use of his premises."

Schoonmaker, however, begat confusion regarding the statutory requirement of knowledge. Subsequent cases have ruled consistently with the result that an owner's knowledge is not required. *Bitonti, supra,* and *People ex rel Wayne Prosecuting Attorney v Tate,* 306 Mich 667; 11 NW2d 282 (1943), involved the abatement of a motor vehicle

[27] See n 26.

illegally used for gambling. Both cases relied on the statute, holding that an owner's knowledge is not required.[28] However, several other cases apparently read *Schoonmaker* to require the owner's knowledge.[29] In light of the plain language of the nuisance abatement statute and the Michigan Supreme Court decisions in *Robinson, Bitonti,* and *Tate,* we would hold that the statute expressly obviates the requirement that an owner consent to or acquiesce in the illegal use of property.[30] We likewise would

[28] Also, in *State ex rel Oakland Prosecuting Attorney v Weaver,* 74 Mich App 462, 464; 254 NW2d 68 (1977), the Court of Appeals again considered the knowledge requirement of the nuisance statute and concluded: "Considering the clear language of the statute, we are convinced that *Robinson, Bitonti* and *Tate* are correct."

[29] In *State ex rel Wayne Prosecuting Attorney v Weitzman,* 21 Mich App 705, 711; 176 NW2d 463 (1970), the Court held that an owner must have knowledge of acts of prostitution before padlocking the premises. *Weitzman* acknowledged *Robinson* and its progeny, but chose the course initiated by *Schoonmaker. Id.* Likewise, in *Motorama, supra* at 228, the Court of Appeals returned to the *Schoonmaker* decision, after *Weaver,* n 28 *supra* stating that it had never been formally overruled. Motorama also cited dicta from *Levenburg, supra,* supporting its decision requiring an owner's knowledge:

> [W]e acknowledge that a judgment for abatement in a prosecution of this nature cannot be rendered without a finding of knowledge of the accosting and soliciting on the part of the owners or operators of the place found to be a nuisance and their acquiescence in those activities. [*Id.* at 462, n 1.]

[30] As explained in *McKibbin v Corp & Securities Comm,* 369 Mich 69, 81; 119 NW2d 557 (1963), "[w]e have no other duty to perform than to construe the legislative will as we find it, without regard to our own views as to the wisdom or justice of the act."

hold that *Schoonmaker* is distinguishable because in that case "[i]ntoxicating liquor was not used in the dance hall but secreted by patrons outside of the hall and secretly visited." *Id.* at 182.[31]

B

Finally, therefore, we consider the constitutional significance of the abatement of Mrs. Bennis' interest in the vehicle. We assume, arguendo, that Mrs. Bennis did not have knowledge of or consent to the misuse of the Bennis vehicle, of which she was co-title owner. Historically, consideration was not given to the innocence of an owner because the property subject to forfeiture was the evil sought to be remedied.[32] As recently as the landmark forfeiture case, *Calero-Toledo v Pearson Yacht Leasing Co,*

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[31] To the extent the reasoning of *Schoonmaker* may be read to imply that an owner must know that the property is being used in proscription of the statute, we choose not to follow it.

[32] See, e.g., *The Palmyra*, 25 US (12 Wheat) 1, 14; 6 L Ed 31 (1827), in which Justice Story held that "[t]he thing is here primarily considered as the offender, or rather the offence is attached primarily to the thing. . . ." In *United States v The Little Charles*, 26 F Cas 979, 982; 1 Brock 347 (CC D Va, 1818) (No. 15,612), Chief Justice Marshall held that the proceeding was "against the vessel, for an offence committed by the vessel, which is not less an offence, and does not the less subject her to forfeiture, because it was committed without the authority, and against the will of the owner." *Dobbins' Distillery v United States*, 96 US 395, 400; 24 L Ed 637 (1877), stated that "[b]eyond all doubt, the act of Congress in question attaches the offence to the distillery, and the real and personal property connected with the same. . . ." *Harmony v United States*, 43 US (2 How) 210, 238; 11 L Ed 239 (1844).

416 US 663, 683; 94 S Ct 2080; 40 L Ed 2d 452 (1974), the United States Supreme Court has reflected this view: "the innocence of the owner of property subject to forfeiture has almost uniformly been rejected as a defense."

In *Van Oster v Kansas*, 272 US 465, 467; 47 S Ct 133; 71 L Ed 354 (1926), the Supreme Court upheld the forfeiture and sale of an automobile used to transport liquor as proscribed by a Kansas statute. In declaring the vehicle a common nuisance, the Court rejected the innocent owner's Fourteenth Amendment due process claim because "the offense of unlawful transportation was committed by one entrusted by the owner with the possession and use of the offending vehicle."

In *Calero, supra*, the Supreme Court forfeited a lessor's interest in a yacht used to transport marijuana. The lessor had no knowledge that the yacht was used illegally.[33] Consistent with *Van Oster, supra*, the Court stated that it "has been implied that it would be difficult to reject the constitutional claim of an owner whose property subjected to forfeiture had been taken from him without his privity or consent." *Calero, supra* at 689. *Calero* went further and stated in dicta that "the same might be

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[33] The Court ultimately held that the boat subject to forfeiture was voluntarily entrusted to a lessee who illegally used it and that, because there was no allegation or proof that the innocent lessor "did all that it reasonably could to avoid having its property put to an unlawful use," forfeiture was appropriate, despite the company's lack of knowledge. *Id.* at 690. The Court further stated that the contested forfeiture statutes "further the punitive and deterrent purposes that have been found sufficient to uphold, against constitutional challenge, the application of other forfeiture statutes to the property of innocents." *Id.* at 686.

said of an owner who proved not only that he was uninvolved in and unaware of the wrongful activity, but also that he had done all that reasonably could be expected to prevent the proscribed use of his property. . . . " *Id.*

Applying the principles of *Van Oster* and *Calero*, it is evident that Mrs. Bennis' claim is without constitutional consequence. Mrs. Bennis was a joint owner who explicitly or implicitly *entrusted* Mr. Bennis with the use and possession of their vehicle. *Van Oster, supra.* It is clear from *Calero* that the abatement of property stolen from the owner or taken without the owner's knowledge would be prohibited. However, on the basis of the facts before us, the argument cannot be made that the vehicle was stolen or initially driven without Mrs. Bennis' knowledge.

Moreover, in the Michigan forfeiture case, *People v One 1979 Honda Automobile*, 139 Mich App 651, 655-656; 362 NW2d 860 (1984), the Court of Appeals held that knowledge by one co-owner of the illegal activity was sufficient to forfeit the interest of both owners. The car was forfeited[34] in that case even though one of the titled owners had no knowledge of the illegal activities committed within the car. *Id.* The unconstitutionality of the forfeiture was not even considered.[35]

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[34] The car was used to facilitate an illegal drug transaction.

[35] See also *In re Forfeiture of $53*, 178 Mich App 480, 495; 444 NW2d 182 (1989), in which the Court again considered the issue and this time determined that the forfeiture statute "was intended to establish a separate defense for *each* claimant who has a personal interest in the property as an owner." Although the Court did not forfeit the interest of the innocent owner, the decision was based on statutory construction, not a constitutional violation.

Having concluded that the abatement of the Bennis vehicle is not constitutionally infirm, we address the dissent's contention that "the trial court has broad discretion to fashion an appropriate remedy." *Post*, p. 753. It is not contested that this is an equitable action. That being the case, it is critical to recognize that the trial judge considered alternatives on the record and, in the exercise of his discretion, fashioned an appropriate remedy, abating the entire interest in the vehicle. We merely sanction the trial judge's action, which is clearly permitted under the nuisance abatement statute, and find that such action was not an abuse of discretion.

Review of the controlling cases persuades us that no constitutional violation results from the abatement of Mrs. Bennis' interest in the vehicle. The United States Supreme Court indisputably allows forfeiture of an innocent owner's property, unless evidence was submitted that the property was stolen or used without the consent of the owner.[36] *Van Oster; Calero, supra.* Other jurisdictions addressing the issue have allowed the abatement of

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[36] We note the distinction between the situation in which a vehicle is used without the owner's consent and, although the owner consented to the use, it is used in a *manner* to which the owner did not consent. In the former, the innocent owner's interest could not be abated. *Van Oster; Calero, supra.* In the latter, as in the present case, the innocent owner's interest may be abated.

a co-owner's interest on strikingly similar facts.[37] The Michigan nuisance abatement statute specifically obviates the requirement of proof, and because the statute does not violate the constitution, the Court of Appeals incorrectly held that proof of knowledge of the proscribed activity is required. Additionally, we do not find that the trial judge abused his discretion in fashioning an appropriate remedy, abating the entire interest of the vehicle.

V

In summary, we would hold that an act of lewdness as defined herein occurred and made the vehicle abatable. Moreover, reviewing the entire record, we find that an act of fellatio occurred so as to create a clear inference that it was for monetary compensation. Proof of an actual exchange of the money is not required by the statute or

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[37] Similarly, in *People v Garner*, 732 P2d 1194, 1196 (Colo, 1987), the Colorado Supreme Court held that the entire ownership of an abated vehicle *could not* be vested in the innocent co-owner wife. The court stated that the district court had "inherent equitable authority" to allocate a portion of the proceeds after costs to the innocent owner. Under the statute, however, the court *was not* obliged to do so. Further, in any event, the court could not award the innocent co-owner wife full ownership of the vehicle.

In *In re 1976 Blue Ford Pickup*, 120 Ariz 432, 435; 586 P2d 993 (Ariz App, 1978), the Arizona Court of Appeals upheld forfeiture of a truck jointly owned by a mother and son where the mother had no knowledge of the prohibited use of the truck. The son's illegal possession of marijuana subjected the truck to forfeiture, and the mother's status as an innocent owner could not "salvage the vehicle from the forfeiture occasioned through the activities of the joint owner."

decisions of this Court. Thus, alternatively, we would hold that a complete act of prostitution occurred in the Bennis vehicle. Additionally, because the act occurred in a neighborhood that was a place reputed for prostitution and therefore a public nuisance, Mr. Bennis' vehicle contributed to that continuing nuisance and may be abated. Finally, we would hold that the clear and unambiguous language of the Michigan nuisance statute obviates the requirement of an owner's knowledge of the proscribed activity and that the statute unquestionably passes constitutional muster. For all of the foregoing reasons, we would reverse the decision of the Court of Appeals.

BOYLE and MALLETT, JJ., concurred with RILEY, J.

GRIFFIN, J., concurred only in the result.

CAVANAGH, C.J. (*dissenting*). As Mr. Rogers would say, "It's a wonderful day in the neighborhood." In this public nuisance abatement case, the focus should be clear: Was the defendants' vehicle an abatable public nuisance? I cannot agree with the lead opinion's mystical concept that under the statute we can call the *condition* of an entire neighborhood a public nuisance. Nor can I agree with its invention that any vehicle contributing to this condition can be abated.

I remain unconvinced that the conduct at issue in the instant case comes within the scope of the public nuisance abatement statute. Assuming arguendo that it does, I do not believe that a single incident, absent circumstances giving rise to a reasonable inference of habitual and continuing nuisance activity, is sufficient to support abatement. Therefore I dissent.

I. THE SINGLE INSTANCE OF ACTIVITY ISSUE

Assuming arguendo that the conduct did fall within the scope of the public nuisance abatement statute, the issue becomes whether a single instance of that conduct establishes an abatable public nuisance.

The lead opinion states:

> [W]e must next determine whether *an* act of prostitution committed in a neighborhood known for illicit activity is within the purview of the statute. [*Ante*, pp 729-730.]

There are serious flaws with the mystical concept that follows. The lead opinion examines the *evidentiary* provision of the statute and finds the word "place." Yet, "place" is already used in the statutory provision that defines an abatable public nuisance, i.e., § 3801: "Any building, vehicle, boat, aircraft, or place. . . . " MCL 600.3801; MSA 27A.3801.

The lead opinion reasons:

> The nuisance abatement statute's use of the disjunctive "or" allows us to consider the reputation of the vehicle *or* the place to determine whether a nuisance exists. [*Ante*, p 733.]

The lead opinion then relies on the dictionary definition of "place" to reach "neighborhood." Relying on testimony about prostitutes in the neighborhood, the lead opinion concludes that this "condition" of the *neighborhood* is a public nuisance.

Note, the lead opinion would not hold that the *vehicle is* the nuisance. It cites *People ex rel Wayne Co Prosecutor v Sill*, 310 Mich 570; 17 NW2d 756 (1945), as support. In *Sill*,

the *car* that was used for gambling purposes was declared the nuisance. *Id.* at 572. It also cites *State ex rel Wayne Co Prosecuting Attorney v Bernstein*, 57 Mich App 204; 226 NW2d 56 (1974). In *Bernstein*, the *bar* where the prostitutes were soliciting was declared the nuisance. *Id.* at 205. It also relies on *State ex rel Attorney General v Robinson*, 250 Mich 99; 229 NW 403 (1930). There, the *apartment* where the act of prostitution occurred was declared the nuisance. *Id.* at 104. None of these cases supports the holding that the condition is the nuisance.

The lead opinion addresses the single incident issue in one short passage. It relies on *State ex rel Attorney General v Robinson, supra.*

In *Robinson*, the defendant's building contained fifty apartments. The building had a reputation for prostitution. A police officer witnessed a solicitation outside the building, watched two persons into the building, and arrested the pair when they came out of the building. The woman told the officer that they had used apartment 404. The trial court abated twenty-two of the apartments. This Court reversed the abatement order with respect to twenty-one of the apartments on the basis of the statutory provision that the nuisance activity must have occurred within thirty days of filing the complaint. *Id.* at 103. Since only the particular incident in apartment 404 had occurred within the thirty days preceding the filing of the complaint, the Court found that abatement of the other twenty-one apartments was improper. However, it abated apartment 404 on the basis of the incident observed by the police officer and because the Court found that the activity in that apartment was not an isolated event on the basis of the reputation of the building. *Id.* at 103-104.

Robinson is clearly distinguishable. The apartment was a permanent part of the building. Therefore, the reputation of the building is logically relevant to a permanent part of the building. Contrary to the statement of the lead opinion that the building in *Robinson* could not be abated, the *Robinson* Court stated that "if the apartment was not identified, then the whole house might be closed." *Id.* at 104. Conversely, the vehicle in the instant case was not a permanent part of the "condition," as the lead opinion defines it. Furthermore, because the proper focus in this case is on the vehicle that the plaintiff sought to abate, the reputation of the area is not relevant to whether this particular vehicle is a public nuisance where the vehicle was not permanently connected to the area. Additionally, there is no evidence that continuing nuisance activity was occurring in *this* vehicle.

In the instant case, the lead opinion would hold:

> Where testimony surrounding proof of an incident of prostitution unequivocally establishes that the neighborhood has a reputation for prostitution, the property contributing to the continuance of the nuisance may be abated pursuant to the statute. [*Ante,* p 737.]

The subject of the holding, "property contributing to the continuance of the nuisance," is far too broad and unlimited in scope.

The prosecutor brought this action to abate the defendants' *vehicle.* The public nuisance abatement statute provides:

> Any . . . vehicle, . . . used for the purpose of lewdness, assignation or prostitution . . . , is declared a nuisance, . . . and all . . . nuisances

> shall be enjoined and abated as provided in this act and as provided in the court rules. [MCL 600.3801; MSA 27A.3801.]

The prosecution established only one incident of sexual activity involving *this* vehicle. Further, there was no evidence to create a reasonable inference that the sexual activity in *this* vehicle was habitual or continuing.

The Court of Appeals majority followed the approach taken in *State ex rel Oakland Co Prosecutor v Motorama Motel Corp,* 105 Mich App 224; 307 NW2d 349 (1981), to find that a single incident of lewdness was not sufficient. The *Bennis* majority reasoned:

> The *Motorama* approach best effectuates the purpose of the statute. The abatement statute was enacted to subject houses of prostitution to abatement as nuisances. *State ex rel Wayne Co Prosecutor v Diversified Theatrical Corp,* 396 Mich 244, 246-250; 240 NW2d 460 (1976). The purpose of the act has also been described as eliminating the use of property in connection with gambling, prostitution, and the illicit sale of liquor. *People ex rel Wayne Prosecuting Attorney v Sill,* 310 Mich 570, 575; 17 NW2d 756 (1945); *State ex rel Oakland Prosecuting Attorney v Ginell,* 159 Mich App 679, 681-682; 407 NW2d 59 (1987). The statute is not intended to regulate the morality of individuals, or to prevent incidents of immorality in, for example, hotels that are otherwise respectable establishments. See *Diversified Theatrical Corp, supra,* 247.
>
> As in *Motorama,* we hold that a single incident is insufficient to establish a nuisance. Further, the circumstances of this case do not permit a reasonable inference that the conduct

was habitual. In this case, the prosecution has alleged only a single incident to support the contention that defendants' car was a nuisance. While the prosecution discusses at length the reputation and record of . . . the woman found in the car with Mr. Bennis, this does not establish that defendants' car was used on more than that occasion for lewdness, assignation, or prostitution. Similarly, testimony was presented that Mr. Bennis was seen on more than one occasion driving in that area and talking to women. Not only does this observed conduct not prove that defendant was involved in lewdness, assignation, or prostitution, there was no evidence to establish that this conduct, if it occurred, took place in the vehicle in question. In fact, defendants allegedly purchased the car only three weeks before the incident that gave rise to this action. [200 Mich App at 675-676.]

In *Motorama*,[1] the panel stated that "[a] nuisance involves the notion of repeated or continuing conduct and should not be based upon proof of a single isolated incident unless the facts surrounding that incident permit the reasonable inference that the prohibited conduct was habitual in nature." *Motorama*, at 229-230, citing *People v Bitonti*, 306 Mich 115, 119-120; 10 NW2d 329 (1943).

I would continue this limitation.[2] The New York Court of Appeals similarly follows this approach:

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[1] In *Motorama*, the defendant's hotel was across the street from a bar that was frequented by persons engaged in prostitution. The Court held that the single incident at the hotel was insufficient to support abatement of a nuisance.

[2] See 58 Am Jur 2d, Nuisances, § 77, p 730:

> Nuisance, as a general rule, involves the idea of continuity or recurrence; the maintenance of a nuisance ordinarily implies a continuity of action over a substantial period of time, and the continuance of the acts constituting the nuisance for an unreasonable period. Thus, it has been said that to constitute a nuisance there must be a continuousness or a recurrence of the acts by which it is created.

See, generally, Glesner, *Landlords as cops: Tort, nuisance & forfeiture standards imposing liability on landlords for crime on the premises*, 42 Case W Res L R 679, 716-737 (1992). "Arrests can constitute evidence of a nuisance, but they must be sufficiently frequent to establish a *habitual* illegal use of the property." *Id.* at 732 (emphasis added).

> [W]e do not hold, that any premises on which an isolated act of lewdness, assignation or prostitution occurs is subject to the remedies of [the houses of prostitution abatement statute]. Rather, we agree . . . that "the People will have to show a *consistent pattern* of conduct sufficient to prove that the premises are being employed for a proscribed use." The most significant factors in making this factual determination will be the frequency of the conduct, the knowledge or even encouragement by the defendant of its existence, and the extent of the benefit, direct or indirect, derived by defendant from such activity. [*People ex rel Arcara v Cloud Books, Inc*, 65 NY2d 324, 331; 491 NYS2d 307; 480 NE2d 1089 (1985) (emphasis added) (citation omitted), rev'd on other grounds 478 US 697 (1986) (first amendment issue), modified on remand 68 NY2d 553; 510 NYS2d 844; 503 NE2d 492 (1986).][3]

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[3] See also *New York City v Big Apple Spa*, 130 Misc 2d 920, 923; 497 NYS2d 988 (1986): "One incident of prostitution has been established. An isolated incident is, of course, not enough."

Further, the public nuisance abatement statute is aimed at property that has become so associated with the activity that it has become part of the activity. In *State ex rel Carroll v Gatter*, 43 Wash2d 153, 160; 260 P2d 360 (1953), the Washington Supreme Court construed its state's "red-light" statute, which, like Michigan's "red-light" statute, i.e., the public nuisance abatement statute, was derived from the Iowa abatement statute.[4] It explained the function of the statute:

> To sustain the application of the act, it must be shown to the satisfaction of the court, by a preponderance of the evidence, that the premises were being used as a house of lewdness, assignation, or prostitution as that term is generally understood. The "use" of the premises of which the statute speaks, requires more than a showing that sporadic acts of prostitution occurred therein. . . .
>
> The statute is not directed to the abatement of commercial eroticism – that is governed by the criminal statutes. It is directed to the abatement of premises which, by reason of sufficient happenings therein, *have absorbed and taken the character of the acts committed, and have in fact become houses of lewdness, assignation or prostitution.* [*Id.* at 160. Emphasis added.]

Additionally, the use of the vehicle in the instant case is distinguishable from the use of vehicles in the "numbers racket" gambling cases because the use of the Bennis vehicle was not "essential" to the act of gross

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[4] See *State ex rel Wayne Co Prosecutor v Diversified Theatrical Corp*, supra at 246-247.

indecency. The vehicle was merely a convenient location. By contrast, this Court has held that in the numbers racket situation "[t]he use of automobiles as *essential tools* in this type of gambling is generally recognized." *Sill* at 575 (emphasis added). Where the vehicle is an *essential* tool to accomplish continuing nuisance activity, the argument that a single act is sufficient is much stronger.

In the instant case, I would find that there was no evidence to support a reasonable inference of continuing or habitual illegal activity. Therefore, it was improper to abate the defendants' vehicle.

II. THE KNOWLEDGE ISSUE

As explained above, I do not believe that the conduct at issue was within the scope of the public nuisance abatement statute, nor was it proven to be of a continuing nature. However, in anticipation of cases that do involve proscribed nuisance activity, I address the proof of knowledge issue.

Beginning with *People v Schoonmaker*, 241 Mich 177; 216 NW 456 (1927),[5] two lines of contrary precedent have

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[5] In *Schoonmaker*, the Court considered whether a public dance hall was an abatable public nuisance under an earlier version of this statute. The defendants did not serve alcohol on the premises, but some of their patrons secretly slipped outside the building during the dance to consume alcohol. The Court addressed the threshold of conduct required on the part of the defendant:

> Defendants did not maintain a nuisance unless they permitted such illegal use of the premises; that

developed through Michigan case law regarding whether the plaintiff must show that the owner of the property knew that the nuisance activity was occurring before the property can be abated.[6] In the instant case, the lead opinion addresses the issue and concludes that proof of knowledge is not required. The statute clearly provides that proof of knowledge is not required.[7] And, although abating the property of innocent owners in forfeiture actions arguably does not violate an

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is, consented to it or acquiesced, and whether they did so was a question of fact. . . .

* * *

One inviting the public to his place for commercial purposes must take care not to invite or acquiesce in transgressions of the law. That transgressions may happen is possible, but remain offenses of the wrongdoer unless tolerated by the occupant to the extent of permissive use of the premises for such purpose or indifference thereto. The statute does not deprive one person of the use of his property by reason of the illegal acts of another, unless the owner's use bears a participating relation to the violation. [*Id.* at 181.]

See *State ex rel Wayne Co Prosecutor v Levenburg*, 406 Mich 455, 462, n. 1; 280 NW2d 810 (1979); *State ex rel Oakland Co Prosecutor v Motorama Motel Corp*, *supra* at 228; *State ex rel Wayne Co Prosecutor v Weitzman*, 21 Mich App 705, 710-711; 176 NW2d 463 (1970).

[6] Other cases held that the statute obviated the need for proof of knowledge. See *Bitonti*, at 119 (plurality); *Robinson*, at 103; *State ex rel Oakland Co Prosecutor v Weaver*, 74 Mich App 462, 464; 254 NW2d 68 (1977).

[7] MCL 600.3815; MSA 27A.3815.

owner's constitutional right to due process,[8] that does not make such forfeitures fair or equitable.

The abatement of public nuisances is an equitable action. MCL 600.3805; MSA 27A.3805. See MCR 3.601; 58 Am Jur 2d, Nuisances, § 321, pp 911-912. As such, the trial court has broad discretion to fashion an appropriate remedy.[9] 58 Am Jur 2d, Nuisances, § 355, pp 946-947. Historically, an equity court would not enjoin criminal activity, except in nuisance cases. See Dobbs, Remedies (2d ed), § 2.9(3), p 169. One must remember that the public nuisance abatement action arose in equity because the available legal remedies, i.e., criminal penalties, were

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[8] See *Calero-Toledo v Pearson Yacht Leasing Co*, 416 US 663; 94 S Ct 2080; 40 L Ed 2d 452 (1974).

In the instant case, after reviewing cases from the United States Supreme Court, the majority states:

> The United States Supreme Court indisputably allows forfeiture of an innocent owner's property, unless evidence was submitted that the property was stolen or used without the consent of the owner. [*Ante*, p 742.]

This statement sweeps too broadly. The statement should be limited to due process considerations. The United States Supreme Court has recently held that forfeitures of property under 21 USC 881, the drug forfeiture statute, are subject to the excessive fines constitutional provision. *Austin v United States*, 509 US ___; 113 S Ct 2801; 125 L Ed 2d 488 (1993).

[9] This Court has recognized this broad authority: "Of the transcendent power in an equity court, under its general jurisdiction, to restrain and abate a continuing public nuisance for which, by reason of its extent and nature, there is no plain and adequate legal remedy, there can be no question." *Detroit v Highland Park*, 186 Mich 166, 182; 152 NW 1002 (1915).

inadequate to stop future and continuing injury.[10] Correspondingly, equity courts have shown reluctance to intervene where the activity is criminal. In *People v Lim*, 18 Cal 2d 872; 118 P2d 472 (1941), the California Supreme Court considered whether a gambling establishment could be abated in the absence of a specific statutory provision. It explained the reluctance of equity courts to intervene:

> Conduct against which injunctions are sought in behalf of the public is frequently criminal in nature. While this alone will not prevent the intervention of equity where a clear case justifying equitable relief is present . . . , it is apparent that the equitable remedy has the collateral effect of depriving a defendant of the jury trial to which he would be entitled in a criminal prosecution for violating exactly the same standards of public policy. . . . The defendant also loses the protection of the higher burden of proof required in criminal prosecutions and, after imprisonment and fine for violation of the equity injunction, may be subjected under the criminal law to similar punishment for the same acts. For these reasons *equity is loath to interfere* where the standards of public policy can be enforced by resort to the criminal law, and in the absence of a legislative declaration to that effect, the courts should not broaden the field in which injunctions against criminal activity will be granted. [*Id.* at 880. Emphasis added.]

[10] See *Marsland v Pang*, 5 Hawaii App 463, 475-478; 701 P2d 175 (1985) (reviewing an equity action for nuisance abatement). See, generally, Patterson, *California land use regulation post Lucas: The history and evolution of nuisance and public property laws portend little impact in California*, 11 UCLA J of Envtl & Poly L 175, 186-197 (1993) (history of public nuisance). See *Lucas v South Carolina Coastal Council*, 505 US ___; 112 S Ct 2886; 120 L Ed 2d 798 (1992).

Particularly, where there is no evidence that the conduct at issue will be continuing in the future, the court should hesitate to exercise its equitable powers to abate the property.[11]

Consequently, I would hold that the trial court, exercising its equitable discretion, should consider the equities and circumstances of each case and tailor the remedy to fit the situation. See *People ex rel Wayne Co Prosecutor v Tate*, 306 Mich 667, 669; 11 NW2d 282 (1943) (the decision to deny an abatement order is within judicial discretion).

The Court in *People v Garner*, 732 P2d 1194 (Colo, 1987), illustrated the remedial possibilities for situations involving innocent parties.[12] The *Garner* court noted the equitable powers of the trial court:

> Our construction of the Public Nuisance Statute to require the forfeiture of a jointly

[11] See 58 Am Jur 2d, Nuisances, § 324, p 913 ("injunctive relief against nuisances should be cautiously given").

[12] The *Garner* court explained:

> [T]he court in the exercise of its equity powers had the authority to order a sheriff's sale of the vehicle on the condition that one-half of the proceeds of the sale, after deduction of fees and costs incident to the seizure and the abatement action, be paid to [the ex-wife], or that [the ex-wife] be given the opportunity to bid at the sheriff's sale on the forfeited interest of [the husband] and thereby acquire the entire interest in the vehicle, or that the vehicle be delivered to the seizing agency . . . upon the agency's payment of one-half of the fair market value of the vehicle to [the ex-wife]. [*Id.* at 1198-1199.]

owned vehicle determined to be a public nuisance, even though one of the co-owners is innocent of any wrongdoing, does not mean that the innocent party's interest in the vehicle may not be recognized and conserved. On the contrary, an action for an abatement of a . . . public nuisance is equitable in nature, . . . and while a court in the exercise of its equity powers may not act contrary to statutory mandate, it does retain a considerable degree of discretion and flexibility in fashioning a decree that achieves a fair result under the particular circumstances of the case. . . . In a forfeiture situation, therefore, a court retains the authority to protect, to the extent practicable and within the framework of the statutory dispositional alternatives, the interest of the innocent party. [*Id.* at 1197. Citations omitted.]

For instance, a trial court could order the property sold, with proportionate net proceeds to be paid to innocent owners, or the court could allow the innocent owners to bid at the sale and acquire full ownership interest, or the government agency itself could pay the proportionate net worth directly to the innocent owners. By leaving such a determination to the equitable discretion of the trial court, each case will be decided on its own merits.

In the instant case, the vehicle was jointly owned by Mr. and Mrs. Bennis. Mrs. Bennis had no knowledge that her husband used the vehicle to engage in an act of gross indecency. Assuming arguendo that his conduct came within the reach of the abatement statute, I would hold that the trial court should tailor a remedy to protect her property interest.

In reaching its conclusion that Mrs. Bennis' property interest may be abated, the lead opinion cites *People v One 1979 Honda Automobile*, 139 Mich App 651; 362 NW2d 860 (1984), to support its proposition that proof of knowledge is not required. Its reliance is misplaced. There, the arrangement between the co-owners, a father and his daughter, was really a secured transaction.[13] The father loaned his daughter money to purchase the car. The daughter was the sole driver of the car. The forfeiture action arose because of her use of the car to make a delivery of marijuana. In the drug statute forfeiture provisions there is an exemption for innocent owners. The issue was whether the father's lack of knowledge exempted the vehicle from forfeiture. Instead, the panel focused on the daughter's knowledge and found it sufficient to support forfeiture. The panel did not address the effect of forfeiture on the father's interest. Additionally, *1979 Honda* did not arise under the nuisance abatement statute. Further, this case is factually distinguishable because Mr. and Mrs. Bennis owned the vehicle as joint owners – not as lender/borrower.

The lead opinion tries to distinguish *In re Forfeiture of $53*, 178 Mich App 480; 444 NW2d 182 (1989), because it was based on statutory construction – not constitutional violation. There, the panel thoroughly considered the statutory "innocent owner" defense found in MCL

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[13] A father and a daughter were co-title owners of the car. However, the father did not live with his daughter, his address was not on the registration, the daughter had sole possession of the car, and she paid all the insurance premiums.

333.7521; MSA 14.15(7521). The panel examined federal and state law interpretations. The panel concluded:

> To summarize, we conclude that § 7521(1)(d)(ii) was intended to establish a separate defense for each claimant who has a personal interest in the property as an owner. Hence, where the prosecution commences an action against a conveyance that is used for unlawful narcotics activity, the forfeiture of the res is subject to the interest of a co-owner who proves that the proscribed act was done without his or her knowledge or consent, express or implied. *The state may only forfeit the ownership interest of the noninnocent owner.* If, for example, the innocent owner has a fifty percent interest in the vehicle, the property may be sold and the proceeds divided equally between the state and the innocent co-owner. [*Forfeiture of $53* at 495-496 (emphasis added).]

Even though this *Forfeiture of $53* arose under a different statute, I believe that it supports an approach that protects innocent co-owners.

In the case at bar, the lead opinion also cites *In re 1976 Blue Ford Pickup*, 120 Ariz 432, 586 P2d 993 (Ariz App, 1978). While it is true that the court upheld the forfeiture of the mother's joint interest in the truck, the court did so after focusing on the unique facts of the case.[14] Arguably, the case was the exception to the general rule. The vehicle was titled in the names of mother *or*

[14] The mother bought the car with her own money and originally titled the car in her name *and* her son's name. The son moved to Arizona, and the title was changed to mother *or* son. *Id.* at 433-434.

son. Under Arizona law, such a title allows *either* joint owner to transfer complete ownership interest in the vehicle without consent of the other.[15] Further, the son had exclusive possession of the vehicle in another state. Unfortunately for the mother, she could have preserved her interest had she been a secured creditor, rather than co-owner. *Id.* at 435.

Notwithstanding its determination of the outcome, the *Blue Ford Pickup* court cited with approval the general rule that innocent owners will not lose their interests:

> "[A]n automobile may *not* be forfeited . . . unless the owner has some connection with the unlawful act, or intended to permit the automobile to be used by a third person in the commission of the unlawful act, or had knowledge it was to be so used. This is in line with the trend of the more recent decisions of the United States Supreme Court in the protection of constitutional rights, both of person and property." [*Id.* at 434, quoting *In re One 1965 Ford Mustang*, 105 Ariz 293, 300; 463 P2d 827 (1970) (emphasis added).]

III. CONCLUSION

I disagree with the conclusion of the lead opinion that the "condition" of the "neighborhood" is the public nuisance. I also disagree with the position of the lead opinion that a single act of prohibited conduct is sufficient to support abatement, without evidence that the

[15] The statute requires consent to such transfers at the time joint owners obtain such a certificate of title.

conduct is habitual or continuing. Public nuisances, by their very nature, imply a continuing condition. The public nuisance abatement statute is aimed at property that has become so associated with an activity that it has become part of the activity. In the instant case, the vehicle was only a convenient site for the activity to occur. This situation is far different from shutting down a building, i.e., a brothel or a crack house, that has become so associated with the illegal activity that it has become part of the activity. Here, the vehicle can be driven out of the "neighborhood" without becoming permanently tainted as a lewd or prostitution vehicle. Additionally, this situation is far different from shutting down a gambling operation that, as an *essential part of its operation*, uses the vehicles to transport betting slips and money.

In conclusion, I would hold that the activity that occurred in this vehicle is insufficient to subject it to abatement under the public nuisance abatement statute.

I would affirm the judgment of the Court of Appeals.

LEVIN and BRICKLEY, JJ., concurred with CAVANAGH, C.J.

LEVIN, J. (*dissenting*). The nuisance abatement statute, as originally enacted in 1915, declared that a "building or place" used for the purpose of prostitution was an abatable nuisance.[1]

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[1] 1915 PA 272 reading in part as follows:

Section 1. Whoever shall conduct, maintain, own or lease any building or place used for the purpose of lewdness, assignation or prostitution is guilty of a nuisance, and the building or place in or upon which such lewdness, assignation or prostitution is conducted, permitted or carried on, and the furniture, fixtures, and contents are also declared a nuisance, and shall be enjoined and abated as hereinafter provided.

Ten years later, during the Prohibition era, "building or place" was amended to add "vehicle," so that it read "building, *vehicle* or place." For the purpose of "prostitution" was changed to read for the purpose of "prostitution or gambling," and to include such a building, vehicle, or place "used by, or kept for the use of prostitutes or other disorderly persons," or used for the manufacture of, or trafficking in, intoxicating beverages.[2]

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[2] 1925 PA 389 reading in part as follows:

Section 1. Any building, vehicle or place used for the purpose of lewdness, assignation or prostitution or gambling, or used by, or kept for the use of prostitutes or other disorderly persons, or used for the unlawful manufacture, storing, possessing, transporting, sale, keeping for sale, giving away, bartering, furnishing or otherwise disposing of any vinous, malt, brewed, fermented, spirituous or intoxicating liquors or any mixed liquors or beverages, any part of which is intoxicating, is hereby declared a nuisance and the furniture, fixtures and contents of any such building, vehicle or place, and all such intoxicating liquors therein are also declared a nuisance, and all such nuisances shall be enjoined and abated as hereinafter provided. Any person, or his servant, agent or employe [sic] who shall own, lease, conduct or maintain any building, vehicle or place used for any of the purposes or by any of the persons above set forth or where any of the acts above enumerated are conducted, permitted or carried on, is guilty of a nuisance.

The foregoing statutory provision was amended by 1951 PA 80 to add "boat" and "aircraft" as property subject to abatement

I

In the seventy years since the 1925 enactment adding the word "vehicle," there has been no prior reported prosecution of a person for the use of a vehicle for the purpose of prostitution. It thus appears that no automobile used by a man to visit a house of prostitution, or to visit a hotel or apartment house frequented by prostitutes, was abated as a nuisance.[3]

The statute has not heretofore been employed to abate the use of property by someone who was not himself engaged in the illicit activity as a business.[4]

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and forfeiture, and to add trafficking in "narcotic and/or hypnotic drugs" as illicit businesses.

1988 PA 2 substituted "controlled substance" for "narcotic and/or hypnotic drugs."

The current statute, MCL 600.3801; MSA 27A.3801, is set forth in the majority opinion, n 1.

[3] No taxicab, even a taxicab that had been waiting outside a bar frequented by prostitutes, was abated as a nuisance.

No automobile used by a prostitute who hailed men from the vehicle, or who used the vehicle to make a house call, was abated as a nuisance.

I do not wish to be understood as saying that a taxicab so used, or an automobile so used by a prostitute, might not be subject to abatement.

[4] In the following cases, vehicles were found to be nuisances on evidence tending to show that they were used in gambling enterprises. See *People ex rel Wayne Co Prosecutor v Bitonti*, 306 Mich 115; 10 NW2d 329 (1943); *People ex rel Wayne Co Prosecutor v Tate*, 306 Mich 667; 11 NW2d 282 (1943); *People ex rel Wayne Co Prosecutor v Sill*, 310 Mich 570; 17 NW2d 756 (1945); *State ex rel Wayne Co Prosecutor v Martin*, 314 Mich 317; 22 NW2d 381 (1946).

I would hold that a vehicle is not subject to a nuisance abatement action unless the person owning or in lawful possession of the vehicle is engaged in and uses the vehicle in the conduct of illicit activity, described in the statute, as a business.

II

The lead opinion states: "Where testimony surrounding proof of an incident of prostitution unequivocally establishes that the neighborhood has a reputation for prostitution, the property contributing to the continuance of the nuisance may be abated pursuant to the statute."[5] The lead opinion concludes that "the act of prostitution occurring in the Bennis vehicle in a neighborhood known for prostitution" was an abatable nuisance.[6]

The lead opinion thus would hold that a vehicle used by a customer of a prostitute becomes an abatable nuisance when such use contributes to a preexisting prostitution nuisance in a neighborhood, and that a vehicle may be found to so contribute when it is driven to a neighborhood where prostitutes congregate and is used in the commission of an act of prostitution in such a neighborhood.

The lead opinion thus appears to recognize that ordinarily the occasional use by a person, not himself engaged in an illicit activity as a business, of his vehicle to participate in illicit conduct, was not intended by the

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[5] *Ante*, p 737.

[6] *Id.*, p 737.

Legislature to permit the declaration of the vehicle as an abatable nuisance even though the customer's conduct might be punishable as a criminal offense.

The reasoning of the lead opinion would mean that a customer's vehicle used for prostitution may be abated as a nuisance when driven to and so used on Eight Mile Road in Detroit, but not when so used in Northville or Charlevoix. Some prosecutors and judges may think that way, but legislators do not.

I suggest that compliance with the admonishment, quoted approvingly by the lead opinion, that "[w]e have no other duty to perform than to construe the legislative will as we find it,"[7] requires that we not attribute to the Legislature an intent to permit the seizure of a customer's vehicle, only occasionally used in illicit activity, when the customer is not himself engaged in the illicit activity as a business.

The Legislature may, of course, amend the statute to provide for the seizure of customer vehicles, but, if the Legislature does so, it will surely so provide without regard to the neighborhood in which the customer of a prostitute uses his vehicle, whether in Northville, Charlevoix, or Detroit.

III

Among the least persuasive arguments advanced by the lead opinion is the contention that "place" means the

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[7] *McKibbin v Corp & Securities Comm*, 369 Mich 69, 81; 119 NW2d 557 (1963), quoted approvingly, *ante*, p 739, n 30.

neighborhood, and that it must be so construed to give meaning to all the words in the statute.[8] The word "place" was part of the original enactment, "building or place."[9] The Legislature had in mind that there might be a place that was not a building that might be used for prostitution that should be subject to an abatement action.

The general reputation of the place was admissible under the statute for the purpose of showing that the place is a nuisance.[10] An automobile was not such a place when this legislation was first enacted in 1915. Vehicles were not added until 1925, at which time the Legislature distinguished between the general reputation of a building, and of a vehicle, and of a place.[11] The general reputation of a place may be considered for the purpose of showing that the place is a nuisance, and of a vehicle for the purpose of showing that the vehicle is a nuisance.[12] But the general reputation of a place where the vehicle is driven or used may not, under the statutory provision for use of general reputation evidence, be relied on for the purpose of showing that the vehicle is a nuisance.

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[8] *Ante*, p 733.

[9] See n 1.

[10] 1915 PA 272, § 3.

[11] 1925 PA 389, § 9. See n 12.

[12] In any action brought under this chapter, evidence of the general reputation of the building, vehicle, boat, aircraft or place is admissible for the purpose of proving the existence of the nuisance. [MCL 600.3815(1); MSA 27A.3815(1).]

Unless a vehicle is itself a nuisance, it is not subject to abatement, and it is not within the intendment of the statute.

Unless a place is itself a nuisance, i.e., a place used for the purpose of prostitution, or used by or kept for the use of prostitutes, it is not subject to abatement, and it is not within the intendment of the statute. The Legislature clearly did not intend that an entire residential neighborhood where prostitutes roam was, as a place, subject to abatement.

IV

The reliance of the lead opinion on the statutory language stating that the prosecutor is not required to provide "[p]roof of knowledge of the existence of the nuisance on the part of the defendants or any of them,"[13] to justify its conclusion that an innocent owner's share of the property is subject to forfeiture, is misplaced. This statutory provision only relieves the prosecutor of the burden of showing such knowledge as part of his prima facia case that there is a nuisance subject to abatement.[14]

This statutory provision does not make an owner's lack of knowledge immaterial or irrelevant regarding

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[13] MCL 600.3815(2); MSA 27A.3815(2).

[14] See 2 McCormick, Evidence (4th ed), § 342, Presumptions in General, pp 449 ff; § 343, Reasons for the Creation of Presumptions: Illustrative Presumptions, pp 454 ff; § 344, The Effect of Presumptions in Civil Cases, pp 460 ff.

See also LaFave & Scott, Criminal Law (2d ed), § 213, Constitutional Limitations – Due Process and Statutory Presumptions, Defenses, and Exceptions, pp 158 ff.

whether property that is subject to abatement as a nuisance should be forfeited. As a matter of statutory construction, I would hold that an innocent co-owner's share of the vehicle is not subject to forfeiture. Such a construction is especially called for where the Court by construction today enlarges the application of the nuisance abatement statute beyond its letter and beyond any prior application in its seventy-year history.

ORDER
Entered:

December 30, 1994

Michigan Supreme Court
Lansing, Michigan
Michael F. Cavanagh
Chief Justice

Charles L. Levin
James H. Brickley
Patricia J. Boyle
Dorothy Comstock Riley
Robert P. Griffin
Conrad L. Mallett, Jr.
Associate Justices

PEOPLE OF THE STATE OF MICHIGAN ex rel WAYNE COUNTY PROSECUTOR,

Plaintiff-Appellant,

v

JOHN C. BENNIS and TINA B. BENNIS,

Defendants-Appellees.

SC 97339
CoA 132568
LC 88-824379-CZ

This cause having been brought to this Court by appeal from the decision of the Court of Appeals and having been argued by counsel and due deliberation having been had thereon by the Court, IT IS HEREBY ORDERED that the judgment of the Court of Appeals is REVERSED in conformity with the opinion filed herein.

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

(SEAL) January 23, 1995 /s/ Corbin R. Davis
Clerk

SUPREME COURT OF THE UNITED STATES

No. 94-8729

Tina B. Bennis,

Petitioner

v.

Michigan

ON PETITION FOR WRIT OF CERTIORARI to the Supreme Court of Michigan.

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

June 5, 1995

Supreme Court, U.S.
FILED
AUG 4 1995
CLERK

No. 94-8729

In The

Supreme Court of the United States

October Term, 1995

TINA B. BENNIS,

Petitioner,

v.

STATE OF MICHIGAN
ex rel. WAYNE COUNTY PROSECUTOR,

Respondent.

On Writ Of Certiorari To The
Supreme Court Of Michigan

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

1. Whether a Michigan nuisance abatement statute that permits the forfeiture of a person's property if it is used in a proscribed manner by another person even if the owner had no knowledge of, or culpability in connection with, the misuse of the property violates the Due Process Clause of the Fourteenth Amendment and/or the Takings Clause of the Fifth Amendment (as applied to the states by the Fourteenth Amendment); and

2. Whether the application of that statute to deprive a wife of her interest in an automobile she jointly owned with her husband violated the Due Process Clause of the Fourteenth Amendment and the Takings Clause of the Fifth Amendment (as applied to the states by the Fourteenth Amendment), where the forfeiture resulted from a finding that the husband engaged in a sex act with a reputed prostitute inside the automobile, and where the record established that the wife had no knowledge of or culpability regarding her husband's proscribed use of the vehicle.

LIST OF PARTIES

1. State of Michigan ex rel. Wayne County Prosecutor (Plaintiff below and respondent in the U.S. Supreme Court)

2. John Charles Bennis (Defendant below; not joining in this petition for certiorari)

3. Tina B. Bennis (Defendant below and petitioner in the United States Supreme Court)

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No. 94-8729

In The

Supreme Court of the United States

October Term, 1995

TINA B. BENNIS,

Petitioner,

v.

STATE OF MICHIGAN ex rel.
WAYNE COUNTY PROSECUTOR,

Respondent.

On Writ Of Certiorari To The
Supreme Court Of Michigan

BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the Michigan Supreme Court (J.A. 45) is reported at 447 Mich. 719, 527 N.W.2d 483 (1994). The opinion of the Michigan Court of Appeals (J.A. 29) is reported at 200 Mich. App. 670, 504 N.W.2d 731 (1993). The ruling of the trial court, which was made from the bench (J.A. 13) and implemented by a one-page order (J.A. 27), is unreported.

JURISDICTION

The Michigan Supreme Court entered judgment on December 30, 1994. The petition for a writ of certiorari

was filed on March 29, 1995, and was granted on June 5, 1995. The jurisdiction of the Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fourteenth Amendment to the U.S. Constitution provides, in pertinent part, that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ." The Fifth Amendment to the U.S. Constitution provides, in pertinent part, that "nor shall private property be taken for public use, without just compensation."

The statute involved in this case is codified as amended in the Michigan Compiled Laws Annotated at § 600.3801 et seq. (1981 and Supp. 1995). The specific statutory provisions referred to in the brief, including § 3815(2) and § 3825(2), are reproduced in full as they appear in Michigan Compiled Laws Annotated in an appendix to this brief.

STATEMENT OF THE CASE

Petitioner Tina Bennis and her husband, John Bennis, who resided together in a suburban Detroit community, were joint owners of a 1977 Pontiac. Tina Bennis had provided most of the money used to purchase the car through babysitting and similar jobs. (J.A. 11).

On the evening of October 3, 1988, Mr. Bennis was arrested for gross indecency while he was in the Bennis

car, which was parked on a Detroit street. The arresting officers testified that they approached Mr. Bennis's parked car, illuminated the inside with a flashlight, and observed a woman performing fellatio on Mr. Bennis in the front seat of the car. (R. 29, Trial Transcript at 67-68). Arrest records later showed that the woman had had prior arrests for, *inter alia*, accosting and soliciting. (Trial Transcript at 72-73).

The Bennis's car was seized and the Wayne County Prosecutor,[1] acting in the name of the State of Michigan, filed a civil action against Tina and John Bennis seeking, *inter alia*, a finding that the Bennis vehicle was an abatable public nuisance under a Michigan statute and that it was therefore subject to forfeiture. (J.A. 2) The nuisance abatement proceeding took place on November 2, 1988, just weeks after the complaint was filed by the Wayne County Prosecutor.[2] The respondent sought forfeiture of the Bennis's interest in their car by reason of the single instance of misconduct engaged in by Mr. Bennis in the automobile. The *Bennis* case was the first case tried under a newly implemented Wayne County automobile seizure policy. (J.A. 13). Never before in its history had that

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[1] Wayne County is the county in Michigan that includes within its boundaries the city of Detroit and a number of suburban communities.

[2] Mr. Bennis pled guilty to a misdemeanor indecency charge on January 27, 1989, and was fined $250 and ordered to perform community service. *See* Order of Probation in *People of the State of Michigan v. Bennis*, No. U-325784 (36th District Court, Jan. 27, 1989). The Michigan Supreme Court opinion erroneously implies that Mr. Bennis's conviction preceded the civil nuisance abatement proceeding. (*See* J.A. 47).

statute been invoked to justify the confiscation of a vehicle used to visit a house of prostitution or to otherwise engage the services of a prostitute. (J.A. 90) (Levin, J., dissenting).

The Michigan public nuisance abatement statute (sometimes referred to herein as "the Act") declares specified uses of property to be a "nuisance," M.C.L.A. § 600.3801 (Supp. 1995),[3] and authorizes the state attorney general or a county prosecuting attorney to bring a civil action for equitable relief to abate the nuisance. *Id.* § 600.3805. In addition to the traditional equitable remedy of an injunction to enjoin the nuisance, *see* §§ 600.3801; 600.3805, the Act provides for the forfeiture of certain property found to have been used for the purpose of creating a nuisance. *Id.* § 600.3825.

Under the Act, the use of "any building, vehicle, boat, aircraft or place" for, *inter alia*, the purpose of lewdness, assignation or prostitution or gambling," constitutes a nuisance. *Id.* § 600.3801. If it is established that a "vehicle, boat or aircraft" was used in a manner that constitutes a nuisance, the Act provides that an order of abatement "shall be entered" providing for the forfeiture of that property. *Id.* § 600.3825(1), (2). Under the Act, the proceeds of the sale of forfeited vehicles, boats, and aircraft are to be applied first to cover the costs of keeping and selling the property, and then to lienholders who had no notice of the misuse of the property, with the balance

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[3] M.C.L.A. § 600.3801 and the other sections of the statute cited herein are reproduced in full in an appendix to this brief.

going to the State. *Id.* § 600.3825(3). The statute specifically provides that "[p]roof of knowledge of the existence of the nuisance on the part of the defendants or any of them, is not required." *Id.* § 600.3815(2). Because the proceeding is "civil" and "equitable" in form, most of the procedural protections available in criminal cases, including the right to a jury trial, are not applicable. (R. 29, Trial Transcript at 39) (denying request for jury trial); *see also* Michigan Court Rule 3.601 (1995).

At the nuisance abatement trial, Tina Bennis testified that she did not have any knowledge of her husband soliciting prostitutes. (J.A. 9). She further testified that, on the day he was arrested, she had no knowledge that he was going to do anything but come directly home from work, as he always had before. (J.A. 9, 11-12). Respondent conceded on appeal that "the lower court transcript did not show knowledge on the part of Mrs. Bennis . . . ." (Plaintiff-Appellant's 6-9-94 Brief on Appeal to the Michigan Supreme Court at 29).

The trial court found that John Bennis had engaged in an act of lewdness (J.A. 23), and ruled that both his ownership interest in the Bennis vehicle and that of Tina Bennis would be forfeited (J.A. 25-26), despite her lack of knowledge of the misuse.[4] The court ordered the vehicle

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[4] The trial judge made very few findings regarding the property interest of petitioner in the Bennis vehicle, and at one point suggested rather arbitrarily that the rights of an innocent owner would vary depending on the existence of "a different situation, different car, age of car, value, so forth." (J.A. 26). The trial judge said that in other circumstances, "[he] would consider the concerns of Mrs. Bennis . . . ." (J.A. 25). He ruled that he

to be sold, and the proceeds to be used to cover the costs incurred by the Wayne County Prosecutor and the Detroit Police Department, with any balance to be paid to the State of Michigan. (J.A. 26, 28). The trial court file contains no accounting of the amount and disposition of any proceeds realized from the sale of the vehicle.

The Michigan Court of Appeals reversed the trial court's order of forfeiture on statutory grounds in a 2 to 1 decision. (J.A. 29). The Michigan Court of Appeals held that proof of a single incident of "lewdness, assignation, or prostitution" was insufficient to establish a nuisance, and, moreover, that the Wayne County Prosecutor had failed to demonstrate that a prostitution related offense had occurred. (J.A. 33-34, 35). The Court of Appeals also construed the nuisance abatement statute to require the County to prove knowledge on Tina Bennis's part that her husband used the vehicle for a purpose proscribed by the statute. (J.A. 32). It held that "the record in this case does not support a finding that Mrs. Bennis knew the vehicle was being used for such [a] purpose." (J.A. 32). This alternative holding meant that, even assuming *arguendo* that forfeiture of the vehicle was otherwise proper, forfeiture of Tina Bennis's interest in the vehicle was not. Because the Michigan Court of Appeals decided the statutory issues in favor of John and Tina Bennis, it was not necessary to reach any constitutional issues relating to the confiscation of Tina Bennis's interest in the car.

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would not do so in this case because the Bennis family had another vehicle, and because, after deducting court costs from the sale proceeds, there would be "practically nothing left" to compensate petitioner for her interest in the vehicle. (J.A. 25).

The Michigan Supreme Court granted leave to appeal and reversed the judgment of the Michigan Court of Appeals in a 4 to 3 decision upholding the forfeiture. (J.A. 45). Of the four justices voting to uphold the forfeiture, three joined a plurality opinion and a fourth concurred in the result only, without writing separately. The *Bennis* opinion disagreed with the Court of Appeals' ruling on the statutory issues and rejected Tina Bennis's constitutional claim that the forfeiture of her interest violated the Due Process and Takings Clauses. The Justice who provided the fourth vote for reversal necessarily must have rejected Tina Bennis's constitutional claim as well.[5]

The plurality opinion first concluded that an act of "lewdness, assignation, or prostitution" within the meaning of the nuisance abatement statute had occurred in the vehicle. (J.A. 48-54). It then construed the Act to permit a forfeiture based upon a single act of lewdness in connection with an act of prostitution, as long as the driver "entered into and thereby contributed to an existing condition that is a public nuisance." (J.A. 59). These conclusions were dispositive of the issues regarding the forfeitability of Mr. Bennis's interest in the automobile.

Addressing the forfeiture of Tina Bennis's interest in the vehicle, the plurality opinion, construing what it said

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[5] The plurality opinion was written by Justice Riley and joined by Justices Boyle and Mallett. Justice Griffin concurred in the result only. Chief Justice Cavanagh wrote a dissenting opinion that was joined by Justices Brickley and Levin. (J.A. 71). The dissent was also unpersuaded by Tina Bennis's constitutional claim, at least to the extent it was grounded in due process. (J.A. 80-81 & n.8). Justice Levin wrote a separate dissenting opinion that dealt exclusively with statutory issues. (J.A. 88).

was "the plain language of the nuisance abatement statute," concluded that it "expressly obviates the requirement that an owner consent to or acquiesce in the illegal use of property." (J.A. 65). The opinion did not purport to disturb the Court of Appeals' holding that the record did not support a finding of knowledge on the part of Tina Bennis. The Court assumed for the purposes of its analysis that she "did not have knowledge of or consent to the misuse of the Bennis vehicle, of which she was co-title owner." (J.A. 66). But because the opinion concluded that, under the "plain language" of the statute, the owner's knowledge of or consent to the misuse of the property was immaterial, forfeiture of Tina Bennis's interest was deemed to be statutorily authorized. (J.A. 63-66).

The Michigan Supreme Court opinion then addressed whether the nuisance abatement statute or its application to Tina Bennis's interest in the automobile violated the United States Constitution. (J.A. 66). Tina Bennis argued in the Michigan Supreme Court that, because she was an innocent owner of the automobile, the Due Process Clause of the Fourteenth Amendment, as well as the Takings Clause of the Fifth Amendment (as applied to the states through the Fourteenth Amendment) precluded the forfeiture of her interest. (*See* Defendants-Appellees' 7-14-94 Brief in the Michigan Supreme Court at 14, 15 & n.11, 16).

Relying principally on two decisions of this Court, the Michigan Supreme Court rejected Tina Bennis's constitutional claim. Those two decisions were *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974) and a Prohibition-era case, *Van Oster v. Kansas*, 272 U.S. 465 (1926). The *Bennis* opinion read *Pearson* and *Van Oster* as

establishing that a person's interest in property can constitutionally be forfeited whenever it is entrusted to another person who uses it illegally, regardless of whether the owner has any culpability (including negligence) for the illegal use. (J.A. 69) ("The United States Supreme Court indisputably allows forfeiture of an innocent owner's property, unless evidence was submitted that the property was stolen or used without the consent of the owner.") The *Bennis* opinion concluded that, under this Court's decisions, forfeiture of an innocent owner's property would be constitutional, so long as he or she "consented to the use [of the property]," even if "it [was] used in a *manner* to which the owner did not consent." (J.A. 69, n.36) (emphasis in original).

The Michigan Supreme Court opinion stated that the facts of the case precluded any reliance by Tina Bennis on the sole constitutional exception to forfeiture that was recognized by the Court – use without the consent of the owner. (J.A. 68). The opinion therefore concluded that the application of the statute to deprive Tina Bennis of her interest in the car gave rise to "no constitutional violation . . . ." (J.A. 69). It also concluded that "the [Michigan nuisance abatement] statute unquestionably passes constitutional muster." (J.A. 71).

Petitioner subsequently petitioned this Court for certiorari in a petition filed on March 29, 1995. Certiorari was granted by this Court in an order dated June 5, 1995. (J.A. 98)

SUMMARY OF ARGUMENT

This case arises from the forfeiture of Tina Bennis's property, pursuant to a statute that authorizes forfeitures regardless of the owner's culpability regarding its wrongful use, and in circumstances that demonstrate unequivocally that petitioner had no culpability. In *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974), this Court addressed in dicta whether the property of an owner wholly innocent of culpability may be forfeited consistent with the Due Process Clause. That dicta implicitly recognizes that, where the forfeiture statute at issue serves punitive purposes, the State may not forfeit property on the basis of its misuse by another person, unless the owner had some culpability at least amounting to negligence in connection with the unlawful use. The principle implicit in the dicta – that the State has no legitimate interest in punishing one who is entirely innocent – is axiomatic to our legal tradition and consistent with other decisions of the Court interpreting the Due Process Clause.

The Court's recent decision in *Austin v. United States*, 509 U.S. ___, 125 L. Ed. 2d 488 (1993) provides additional support for recognition of such a due process limitation on forfeiture by having acknowledged that, historically, forfeitures have served as punishment for personal culpability. Moreover, the *Austin* decision demonstrates incontrovertibly that forfeitures under the Michigan nuisance abatement statute impose punishment, and therefore that due process prohibits the statute from authorizing forfeitures of blameless property owners. Application of that due process principle here requires

reversal of the opinion below, because petitioner's property was forfeited as punishment for an act in regard to which she was truly innocent.

The Court has never had occasion to apply the negligence standard set forth in the *Pearson* dicta, and the lower courts have interpreted it in widely divergent ways. The *Austin* decision intimates that an appropriate standard is provided by the common law tort of negligent entrustment. Because of the historic importance of property rights, the need for a clear, uniform standard to guide the lower courts, and the need to avoid "unduly oppressive" confiscations of property from innocent owners like Tina Bennis, the Court should adopt the negligent entrustment standard as the measure of culpability required to satisfy due process in these circumstances.

Under this standard, which can be adapted from the negligent entrustment rule set forth in Restatement (Second) of Torts § 308, Tina Bennis is unquestionably an innocent owner. The forfeiture of her property interest in her automobile therefore violated due process. And section 3815(2) of the Michigan statute, which authorizes the forfeiture of property of innocent owners, must be declared unconstitutional.

The Takings Clause of the Fifth Amendment, as applied to the States through the Fourteenth Amendment, provides an alternative basis for reversing the decision below. The *Pearson* dicta implies that the forfeiture of property of an owner free of any blameworthy conduct, including negligence, would violate the Takings Clause insofar as it forces non-culpable parties to suffer takings

of their property to finance costs of law enforcement and other general activities of the State that should "in all fairness and justice" be borne by the public as a whole. The forfeiture of Tina Bennis's interest in the Bennis automobile was a direct appropriation of her property by the State and she is constitutionally entitled to "just compensation" for that taking. With respect to the facial challenge to the Michigan nuisance statute, section 3815(2) must also be declared unconstitutional as violative of the Takings Clause for similar reasons.

This Court cannot satisfactorily resolve the issues raised by Tina Bennis's facial challenge to the statute without addressing which party should bear the burden of proof with respect to the constitutionally required degree of culpability. The State in the proceedings below sought to place that burden on defendant owners such as Tina Bennis. The issues of the appropriate standard for culpability and the burden of proof allocation are inseparable, both with regard to the principle that protects an innocent person from being punished, and in practical terms. Our legal tradition not only prohibits a State from establishing a procedure that punishes without regard to culpability. It also precludes the government from establishing a procedure that administers the sanction of punishment without the State first proving that some culpable act occurred. And from a practical standpoint, if the Court rules that due process requires some culpability before forfeitures can be effected under the Michigan statute, and yet the State is permitted to place the burden of proving lack of culpability on the defendant, the substantive standard for culpability will be seriously compromised in its application.

Application of the three-part test of *Mathews v. Eldridge*, 424 U.S. 319 (1976) demonstrates that due process requires the State to bear the burden in *in personam* forfeitures under the Michigan nuisance abatement statute. That conclusion is reinforced by the quasi-criminal nature of nuisance abatement proceedings. This Court's recent Takings Clause jurisprudence likewise supports placing the burden of proving the constitutionally required degree of culpability on the State.

ARGUMENT

I. THE MICHIGAN STATUTE AND ITS APPLICATION TO TINA BENNIS, RESULTING IN FORFEITURE OF HER INTEREST IN THE AUTOMOBILE, VIOLATED DUE PROCESS

Petitioner Tina Bennis was never found to have engaged in – nor even alleged to have engaged in – any wrongful conduct. The State nevertheless forfeited her property, pursuant to a nuisance abatement statute that expressly authorizes property forfeitures of owners innocent of any blameworthy conduct. Because the Michigan statute authorizes punishment of innocent persons, the statute violates due process. Therefore, the offending provision of the statute, at least, must be struck down. And because the facts of this case demonstrate unequivocally that Tina Bennis is blameless, the application of the statute to forfeit her interest in the automobile likewise violated due process. The Michigan Supreme Court decision upholding the constitutionality of the statute and its application to Tina Bennis must therefore be reversed.

A. This Court Has Implicitly Recognized That The State Has No Legitimate Interest in Punishing Through Forfeiture Owners Who Are Completely Without Culpability.

This Court addressed the constitutionality of forfeiture of a truly innocent owner's property in dicta in *Calero-Toledo v. Pearson Yacht Leasing Company*, 416 U.S. 663 (1974). In *Pearson*, the Pearson Yacht Leasing Company leased a pleasure yacht to two Puerto Rican residents. Puerto Rican authorities discovered marijuana on board the yacht, and seized the yacht, pursuant to the Commonwealth's civil forfeiture statute.[6] The Puerto Rican authorities conceded that Pearson was uninvolved in and unaware of the wrongful activity of its lessee. *Pearson*, 416 U.S. at 668. Pearson challenged the forfeiture statute on the grounds, *inter alia*, that it "unconstitutionally authorized the taking for government use of innocent parties' property without just compensation."[7] *Id.* at 680.

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[6] The Puerto Rican statute at issue in *Pearson* was modeled after the federal drug forfeiture statute, 21 U.S.C. § 881(a), as those provisions existed in 1973. *Pearson*, 416 U.S. at 686 n.25. At that time, as to persons other than common carriers, the statutory "innocent owner" defense was limited to those who could establish that the illegal use was committed by somebody "unlawfully in the possession" of the conveyance. *Id.*

[7] The yacht leasing company also challenged the constitutionality of the seizure of their yacht on the grounds that the company had not been given pre-seizure notice and an opportunity to be heard. *Pearson*, 416 U.S. at 668. The Court's rejection of that separate constitutional claim is not relevant to the issues presented by this petition for certiorari.

The Supreme Court rejected Pearson's takings claim. In so doing, the Court noted that the Puerto Rican forfeiture statute furthered the "punitive and deterrent purposes" of the "underlying criminal statutes." *Id.* at 686-87. The Court stated that the rationale for applying such forfeiture provisions to "lessors, bailors or secured creditors" who have no direct complicity in the wrongdoing is that it "may have the desirable effect of inducing them to exercise greater care in transferring possession of their property." *Id.* at 687-88.

Although it rejected the facial challenge to the forfeiture statute, the Court did suggest in dicta that some culpability at least amounting to negligence must be present before the government could confiscate property that was entrusted by an owner to another person, who in turn misused it without the knowledge or participation of the owner:

> It therefore has been implied that it would be difficult to reject the constitutional claim of an owner whose property subjected to forfeiture had been taken from him without his privity or consent. . . . Similarly, *the same might be said of an owner who proved not only that he was uninvolved in and unaware of the wrongful activity, but also that he had done all that reasonably could be expected to prevent the proscribed use of his property;* for, in that circumstance, it would be difficult to conclude that forfeiture served legitimate purposes and was not unduly oppressive.

Id. at 689-90 (emphasis added) (citations and footnote omitted). The italicized portion of the dicta quoted above sets forth a three-pronged test to determine whether one has the necessary culpability to justify a forfeiture. A

person who 1) was uninvolved in the wrongful conduct, 2) had no knowledge of it, and 3) took reasonable steps to prevent the proscribed use will not have the requisite culpability. The third prong of the *Pearson* dicta requires some kind of negligence on the part of an otherwise innocent property owner before his or her property can be forfeited. *See Austin v. United States*, 125 L. Ed. 2d at 502, 503 (effectively equating third prong of *Pearson* dicta with "idea that owner has been negligent").[8] The Court in *Pearson* recognized that the forfeiture statute at issue served "punitive" purposes, 416 U.S. at 686, and the dicta can be read as reflecting the Court's implicit view that, with respect to persons wholly free of culpability, punishment serves no "legitimate purposes," *id.* at 690.

The implicit view expressed in *Pearson* that the State has no legitimate interest in the punishment of persons who have not engaged in some blameworthy or culpable conduct is, of course, axiomatic to our legal tradition.

[8] In *Austin*, the Court examined the two theories on which forfeiture of an apparently innocent owner's property had been justified in prior decisions: the "guilty-property fiction," 125 L. Ed. 2d at 502, and the notion that an owner may be held liable for "the wrongs of others to whom he entrusts his property," *id.* at 503. With respect to the guilty-property fiction, the Court stated that it had not used that fiction to justify forfeiture "when the owner had done all that reasonably could be expected to prevent the unlawful use of his property." *Id.* at 502. As for the second theory, the Court stated that, "[l]ike the guilty-property fiction, this theory . . . is premised on the idea that the owner has been negligent." *Id.* at 503.

And, while the *Pearson* Court's invocation of this principle appeared only in dicta, this Court has in other contexts recognized the due process right of an innocent individual to be free of punishment. In *Foucha v. Louisiana*, 504 U.S. 71 (1992), for example, the Court, relying on substantive due process principles, held that once a criminal defendant is found not guilty of a crime, the State may not impose punishment.[9] *Id.* at 80. In this situation, the Court said, the State simply has no "punitive interest." *Id.* Likewise, in *Bell v. Wolfish*, 441 U.S. 520 (1978), the Court held that the constitution prohibited the punishment of criminal defendants who were being detained pending trial on criminal charges. The Court unequivocally stated, "[U]nder the Due Process Clause, a detainee may not be punished prior to an adjudication of guilt . . . ." 441 U.S. at 535. Because "retribution and deterrence are not legitimate . . . governmental objectives" in this context, the Court stated that officials of the detention facility "cannot" constitutionally impose punishment on pre-trial detainees. *Id.* at 539, n.20; *see also id.* at 580 (Stevens, J., dissenting) (regarding the innocent

[9] In *Foucha*, a criminal defendant was found not guilty of the commission of a crime by reason of insanity. *Foucha*, 504 U.S. at 74. He was committed to a forensic facility and kept there indefinitely pursuant to a Louisiana statute despite subsequent medical findings that he was no longer mentally ill. *Id.* at 74-75. The Court held that continued detention under the statute constituted punishment, which the State had no power to inflict, *id.* at 80, and held the statute to be unconstitutional, *id.* at 83.

person's "right to be free of punishment" as an "obvious and indisputable" component of due process).[10]

Thus, the *Pearson* recognition that the government has no legitimate interest in forfeiting a person's property for the purposes of punishment if that person is blameless is firmly grounded in the Due Process Clause,[11] and should be recognized as a constitutional requirement by this Court.[12]

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[10] Justice Stevens's dissent and the majority opinion appeared to agree on the fundamental soundness of this due process principle.

[11] Although the constitutional *holding* rendered by the *Pearson* Court concerned the Takings Clause, a number of lower courts have assumed that the *dicta* provides a due process limitation on property forfeiture of innocent owners. *See, e.g., United States v. 38 Whalers Cove Drive*, 954 F.2d 29, 33 (2d Cir. 1992), *cert. denied, Levin v. United States*, 121 L. Ed. 2d 24 (1992); *United States v. One 1973 Buick Riviera Automobile*, 560 F.2d 897, 900-01 (8th Cir. 1977); *United States v. One 1982 Oldsmobile Cutlass*, 709 F. Supp. 1542, 1551 (W.D. Okla. 1989), *modified on other grounds*, 739 F. Supp. 1490 (W.D. Okla. 1989).

[12] The Court's holding in *Austin v. United States* that the Eighth Amendment's Excessive Fines Clause applies to civil forfeiture under 21 U.S.C. § 881(a) offers another basis for concluding that innocent owners have constitutional protection from forfeiture. The Eighth Circuit decision under review in *Austin* had assumed that forfeiture of the property of an innocent owner was constitutional, and had concluded *a fortiori* that the Eighth Amendment did not require proportionality review of the forfeiture of culpable owner's property. *Austin*, 125 L. Ed. 2d at 495. By holding that the Eighth Amendment was applicable to civil forfeitures, the Court implicitly rejected the premise that the property of a truly innocent owner can be forfeited. At the very least, the Court's holding that the Eighth Amendment applies to civil forfeitures because they constitute punishment would be difficult to reconcile with any rule allowing truly

The Court's recent decision in *Austin* establishes that there is a historical basis for the due process principle implicitly recognized in *Pearson*. The Court in *Austin*, reviewing nearly two centuries of its forfeiture jurisprudence, concluded that its decisions have "consistently . . . recognized that forfeiture serves, at least in part, to punish the owner" for personal culpability. 125 L. Ed. 2d at 503; *see also id.* at 500-502. Besides providing a historical analysis that supports a due process-based prohibition against the use of forfeiture to punish blameless owners, the *Austin* decision demonstrates conclusively that forfeiture under the Michigan statute is punishment, and hence that the statute is subject to that constitutional prohibition.

Austin held specifically that civil forfeiture under two widely used provisions of the federal drug forfeiture statute – 21 U.S.C. § 881(a)(4) and § 881(a)(7) – constitutes punishment. 125 L. Ed. 2d at 505. The Court's rejection of the government's contention that these provisions are "remedial," rather than "punitive" in nature, *id.* at 504-05, applies with equal force to the forfeiture provisions of the Michigan statute. The conveyances referred to in

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innocent persons to be punished by civil forfeiture. Because the concept of proportionality review presupposes some culpable conduct against which to measure the nature and severity of the punishment, proportionality review could not apply to cases in which the owner has no culpability of any kind. To hold that the constitution requires "excessiveness" scrutiny of forfeitures of property belonging to blameworthy owners, but puts no limitation whatsoever on whether, and to what extent, property can be forfeited from a wholly innocent owner, would be anomalous.

§ 881(a)(4) ("aircraft, vehicles or vessels") are virtually identical to those referred to in § 3825(2) of the Michigan statute ("vehicle, boat, or aircraft"). Because their value can vary dramatically, forfeiture of such property cannot be regarded as "remedial" in the sense of reimbursing government for the costs of law enforcement. *Austin*, 125 L. Ed. 2d at 505. And because the possession of conveyances such as cars is perfectly legal, and inasmuch as conveyances have many legitimate uses, any analogy to the remedial purpose of seizing contraband must also fail.[13] *Id*. Like forfeitures under §§ 881(a)(4) and 881(a)(7), forfeitures under the Michigan statute are undeniably "punishment." As such, due process forbids the statute from authorizing the confiscation of property of somebody like Tina Bennis who has no culpability whatsoever regarding the wrongful use of her property.

Moreover, the State has acknowledged in the proceedings below that forfeitures in this context are punitive, and that the nuisance abatement proceeding is nothing more than a low-cost substitute for a prosecution of the underlying crime. In its brief on appeal to the Michigan Supreme Court, respondent stated:

> There also exists a policy reason why the lower [trial] court decision should be affirmed. Confiscation of an automobile in the context that defendant's car was seized has an immediate effect upon the nuisance "market," driving

[13] The invalidity of the analogy is further demonstrated by the fact that, under the Michigan statute and forfeiture statutes generally, the confiscated cars are not destroyed, but are sold to members of the public, and the sale proceeds are deposited into public treasuries.

> away the customers and depriving the vice sellers (prostitutes) of buyers. It is a prime example of an inexpensive, cost-effective, non-docket-clogging alternative to prosecution and imprisonment. *In effect, it is swift and certain "punishment" of the voluntary vice consumer. Recidivism is practically nil, and the deterrence value is great.*

(Plaintiff-Appellant's 6-9-94 Brief on Appeal to the Michigan Supreme Court at 22) (emphasis added). Besides demonstrating that the sanction of forfeiture is punishment, this statement of "policy" by the State confirms that the civil nuisance proceeding serves the same purposes as a criminal "prosecution," albeit without the usual procedural protections that would apply in a criminal proceeding. In other words, the nuisance abatement statute not only imposes punishment in a civil proceeding, but imposes it as a sanction for criminal wrongdoing. The forfeiture proceeding is, in accordance with the State's above characterization, "the functional equivalent of a . . . criminal prosecution . . . ," *Department of Revenue of Montana v. Kurth Ranch*, 511 U.S. ___, 128 L. Ed. 2d 767, 782 (1994).

B. The Michigan Supreme Court Rule Regarding The Constitutional Limits To Forfeiture Does Not Accord With The Requirements Of Due Process.

The Michigan Supreme Court justified the constitutionality of the Michigan statute and its application to Tina Bennis by reading *Pearson* and another decision of this Court, *Van Oster v. Kansas*, 272 U.S. 465 (1926), as

establishing that forfeiture of an innocent owner's property would be constitutional, as long as the owner "consented to the use [of the property]" even if "it [was] used in a *manner* to which the owner did not consent." (J.A. 69 n.36) (emphasis in original). The *Bennis* opinion concluded that, where a person's property is misused by another in a manner that was not authorized by the owner, the United States Supreme Court "indisputably" allows forfeiture of the property, unless "evidence [is] submitted that the property was stolen or used without the consent of the owner." (J.A. 69). This rule would authorize the forfeiture of property from persons who are innocent even of negligence in entrusting their property to another. To that extent, it squarely contradicts the substantive constitutional standard for culpability that is reflected in the *Pearson* dicta and required by due process.

The Michigan Supreme Court's reliance on *Van Oster* cannot vindicate the constitutional rule it purported to adopt in the *Bennis* opinion. *Van Oster* involved an owner's Fourteenth Amendment due process challenge to the forfeiture of her automobile based on an illegal use (the transportation of liquor) by another person. Citing, *inter alia*, *J. W. Goldsmith, Jr.-Grant Co. v. United States*, 254 U.S. 505 (1921), and *Dobbins's Distillery v. United States*, 96 U.S. 395 (1878), the Court held that the forfeiture was "within the limits of due process." 272 U.S. at 468. To the extent that *Van Oster* stands for the proposition that the forfeiture of property of owners who are completely blameless is consistent with due process, that decision is no longer good law, at least where, as here, the statutory forfeiture scheme at issue serves the purpose of punishment. First, viewed against this Court's historical analysis

of forfeiture in *Austin*, this case seems to be an aberration. In *Austin*, the Court indicated that each of the two theories traditionally used to justify forfeiture is predicated on the negligence of the owner in permitting misuse of his property. 125 L. Ed. 2d at 501. Moreover, *Austin's* characterization of the holdings in *Goldsmith-Grant Co.* and *Dobbins's Distillery*, both of which were relied upon in *Van Oster*, simply cannot be reconciled with the suggestion that forfeiture can be visited upon non-negligent owners. Referring to *Goldsmith-Grant Co.*, *Dobbins's Distillery*, and other decisions, the Court in *Austin* stated that "[i]n none of these cases did the Court apply the guilty-property fiction to justify forfeiture when the owner had done all that reasonably could be expected to prevent the unlawful use of his property." *Id.* at 502. Finally, the Prohibition-era decision in *Van Oster* predates this Court's more recent recognition that due process prohibits the government from punishing those who are innocent of any blameworthy conduct. *Van Oster* simply cannot be used to justify either the constitutional rule or holding in *Bennis*.

C. Because The Record Demonstrates That Tina Bennis Is An Innocent Owner Under The Applicable Standard For Culpability, Forfeiture Of Her Property Interest Violated Due Process.

The Supreme Court has never had occasion to determine the proper application of the negligence prong of the *Pearson* dicta, and thereby to determine the minimum culpability an owner like Tina Bennis must have before

property can be forfeited.[14] In *Austin*, however, the Court discussed in some detail the kind of owner negligence that has traditionally been required in order to justify forfeiture of an owner's property based on the wrongful acts of others. Based on that discussion, a standard for negligence grounded in the common law tort of "negligent entrustment" clearly emerges.

The Court stated in *Austin* that holding the owner "accountable for the wrongs of others to whom he *entrusts* his property" rests "on the notion that the owner has been *negligent* in allowing his property to be misused and that he is properly punished for that negligence." 125 L. Ed. 2d at 501 (emphasis added). If, as *Austin* stated, the nature of the culpable conduct needed to justify the punishment of property forfeiture is negligence in entrusting the property to another, then the common law tort of negligent entrustment provides an appropriate standard for determining culpability. That tort addresses "negligence" in "entrusting" one's property to another, who harms a third person while using it. Use of that standard is also consistent with the *Pearson* Court's statement that the purpose of applying forfeiture provisions to owners who have no direct complicity in the wrongful use of

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[14] The *Pearson* decision itself, while rejecting the yacht leasing company's facial challenge to the Puerto Rican forfeiture statute, offered no opinion as to whether the company did or did not satisfy the negligence prong. Instead, the Court stated that "no allegation has been made or proof offered that the company did all that it reasonably could to avoid having its property put to an unlawful use," 416 U.S. at 690 (citation omitted), and on that basis reversed the lower court opinion, without remand on the negligence issue. *Id.*

their property is to "induc[e] them to exercise greater care in transferring possession of their property." 416 U.S. at 688.

Section 308 of the Restatement (Second) of Torts sets forth a "negligent entrustment" rule, which provides in pertinent part, as follows:

> It is negligence to permit a third party to use a thing . . . which is under the control of the actor, if the actor knows or should know that such person intends or is likely to use the thing . . . in such a manner as to create an unreasonable risk of harm to others.

Restatement (Second) of Torts § 308 (1965). By substituting the words "in a manner proscribed by law" for the words "in such a manner as to create an unreasonable risk of harm to others," the Restatement standard could easily be adapted to define the minimal degree of culpability an owner must have in order for a forfeiture to comport with due process. That rule would collapse the knowledge and negligence prongs of the *Pearson* dicta into a single, easily applied standard.

Both "fundamental fairness" and the historic importance of property rights in our legal and social tradition support the adoption of this standard or one similar to it. A property owner should not be at risk of losing his or her property for acts or omissions that, in analogous settings, would not even give rise to common law tort liability. Moreover, the articulation of a clear rule grounded in familiar tort law concepts would give federal and state courts needed guidance in determining the constitutional limits to forfeitures in cases where the forfeiture statute being applied contains no exemption for

innocent owners.[15] And, finally, adoption of this standard would help ensure that property owners like Tina Bennis are protected from "unduly oppressive," *Pearson*, 416 U.S. at 690, confiscations of their property.

Applying this standard to the record below demonstrates that Tina Bennis had no culpability regarding her husband's wrongful use of the Bennis car. With respect to whether Tina Bennis knew that her husband would use the car in the way he was found to have used it, respondent conceded in its appeal brief to the Michigan Supreme Court that "the lower court transcript did not show knowledge on the part of Mrs. Bennis. . . . " (Plaintiff-Appellant's 6-9-94 Brief on Appeal to the Michigan Supreme Court at 29). At the nuisance abatement trial,

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[15] The decisions of the lower courts reflect starkly conflicting interpretations and applications of the *Pearson* dicta. *See, e.g., United States v. One 1972 Chevrolet Blazer*, 563 F.2d 1386 (9th Cir. 1977) (reversing judgment of forfeiture); *United States v. One 1976 Lincoln Mark IV*, 462 F. Supp. 1383 (W.D. Pa. 1979) (disallowing forfeiture); *United States v. One 1974 Mercury Cougar*, 397 F. Supp. 1325 (C.D. Cal. 1975) (disallowing forfeiture); *United States v. One 1957 Rockwell Aero Commander 680 Aircraft*, 671 F.2d 414 (10th Cir. 1982) (affirming order of forfeiture); *United States v. Six Thousand Seven Hundred Dollars*, 615 F.2d 1 (1st Cir. 1980) (affirming order of forfeiture); *United States v. One Mercedes Benz 380 SEL*, 604 F. Supp. 1307 (S.D. N.Y. 1984) (ordering forfeiture), *aff'd without opinion*, 762 F.2d 991 (2d Cir. 1985). In large measure, the disparate applications of the *Pearson* dicta reflect an inherent tension between the "lack of knowledge" and negligence prongs of the dicta. The existence of a duty to do "all that reasonably could be expected to prevent the proscribed use of [one's] property." *Pearson*, 416 U.S. at 689, arises primarily from an owner's knowledge of the likelihood of an impending misuse. The negligent entrustment standard advocated here would resolve that tension.

Tina Bennis testified that she had no knowledge of her husband soliciting prostitutes and that on the day of his arrest, she did not have any knowledge that he was going to do anything but come directly home from work. (J.A. 9, 11-12). Her testimony accords with the common sense observation that a wife would not have advance knowledge that her husband was planning to use their automobile in the manner John Bennis was found to have used it, even assuming that the husband had planned the act in advance. Nor is there any evidence in the record from which it could be inferred that Tina Bennis "should [have] know[n]" that John Bennis was "likely to use the [car]" in the manner the trial court found him to have used it.

Finally, Tina Bennis does not satisfy the "control" requirement of the Restatement rule. As a co-owner of the vehicle, John Bennis had a right to use it and did not need his wife's permission or authorization to do so. Because his use of the automobile did not depend on Tina Bennis's consent, and because she did not in any meaningful sense have the legal power to prevent his use, the car was not "under [her] control" for purposes of Restatement § 308.

Even if this Court did not employ § 308 as the standard for determining whether there has been a negligent entrustment of property that would justify forfeiture, the record does not support any finding that she was negligent under any other meaningful standard in connection with her husband's use of the vehicle. Whether one did all that could reasonably be expected to prevent a misuse is necessarily a function of whether one knew or should have known of another's criminal wrongdoing. *See United*

States v. One 1976 Lincoln Mark IV, 462 F. Supp. 1383, 1391 (W.D. Pa. 1979). Indeed, if one has no knowledge or reason to know of a wrongful use, then one cannot be expected to take affirmative steps to prevent that use. As to Tina Bennis, it hardly requires argument that a wife would, as a matter of course, take all reasonable steps to assure her husband's fidelity.

Furthermore, the relationship between Tina Bennis and her husband was not a commercial relationship, and she did not stand to benefit financially or otherwise from the particular use he was found to have made of the car. She is not a member of the class of commercial entities – "lessors, bailors, or secured creditors" – that the *Pearson* Court referred to in justifying application of forfeiture provisions to those who have no direct complicity in the criminal use of their property. 416 U.S. at 688. This factor likewise supports a finding that she was a truly innocent owner. *See, United States v. One 1981 Datsun 280ZX*, 644 F. Supp. 1280, 1287 (E.D. Pa. 1986).

In addition, the fact that she lacked meaningful control over her husband's use of the property is another factor supporting the conclusion that Tina Bennis took all steps that "reasonably could be expected" to prevent the proscribed use. *See United States v. 6109 Grubb Road*, 886 F.2d 618, 627 (3rd Cir. 1989) (stating that application of the *Pearson* dicta is "particularly daunting where . . . entireties property is involved"), *reh'g en banc denied*, 890 F.2d 659 (3d Cir. 1989). Because the record reveals that Tina Bennis had no culpability whatsoever in connection with her husband's wrongful use of the family car, the judgment of the Michigan Supreme Court upholding the

forfeiture of her ownership interest in the automobile must be reversed.

D. The Michigan Nuisance Abatement Statute, Or At Least § 3815(2), Must Be Declared Unconstitutional

The Michigan Supreme Court's ruling that the nuisance abatement statute is constitutional (J.A. 70, 71) must also be reversed insofar as it upholds § 3815(2) of the Act.[16] That section provides that "[p]roof of knowledge of the existence of the nuisance on the part of the defendants . . . is not required." M.C.L.A. § 600.3815(2). The Michigan Supreme Court opinion construed the "plain language" of this section to authorize forfeitures regardless of whether the owner had knowledge of, or consented to, or was in any other way blameworthy regarding the illegal use of his or her property. (J.A. 63, 65); *see also* Respondent's Brief in Opposition to Petition for Certiorari at 5 (stating that in contrast to other statutes with innocent owner exemptions, "Michigan's nuisance abatement statutes may abate the interest of an innocent owner.") and at 8-9 ("Michigan's nuisance abatement statute makes it clear: innocence . . . does not excuse

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[16] Although petitioner has made a facial challenge to the Act, it is not necessary for the Court to void the entire statute in order to cure its constitutional infirmity. Declaring only section 3815(2) unconstitutional, while leaving other provisions of the Act operative, is consistent with the rule that "[a] court should refrain from invalidating more of the statute than is necessary. . . . " *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684 (1987) (citation and internal quotation marks omitted); *see also New York v. United States*, 505 U.S. 144, 186 (1992).

possible abatement of the offending property."). As such, § 3815(2) of the Act must be declared unconstitutional.

II. THE MICHIGAN STATUTE AND ITS APPLICATION TO TINA BENNIS, RESULTING IN FORFEITURE OF HER INTEREST IN THE AUTOMOBILE, VIOLATED THE TAKINGS CLAUSE OF THE FIFTH AMENDMENT

A. The Forfeiture Of Tina Bennis's Property Was A Compensable Taking Under The Fifth Amendment

The Takings Clause of the Fifth Amendment affords this Court an alternative basis for holding that the deprivation of Tina Bennis's interest in the family car without compensation was unconstitutional and that § 3815(2) of the Michigan statute is unconstitutional because it authorizes such takings.[17] Although the Court in *Pearson* rejected the facial constitutional challenge to the Puerto Rican drug forfeiture statute on takings grounds, 416 U.S. at 680, that holding is no bar to the facial and "as applied" challenges asserted here. For as discussed earlier, the Court in *Pearson* never reached the merits of the "as applied" constitutional question, *see supra*, p. 24 n.14,

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[17] The Takings Clause of the Fifth Amendment provides that "nor shall private property be taken for public use, without just compensation." The Court has held that the Takings Clause was made applicable to the States by the Fourteenth Amendment. *See Dolan v. City of Tigard*, 512 U.S. ___, 129 L. Ed. 2d 304, 315 n.5 (1994).

and its dicta on that issue actually supports the takings claim being asserted here.[18]

In suggesting that unless a property owner had some culpability (negligence) regarding the misuse of his or her property, forfeiture would be "unduly oppressive," the *Pearson* opinion cited to *Armstrong v. United States*, 364 U.S. 40, 49 (1960). *Pearson*, 416 U.S. at 690. The page of the *Armstrong* opinion cited by the Court states that the purpose of the Takings Clause is to bar the Government "from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong*, 364 U.S. at 49. By citing to *Armstrong*, the *Pearson* Court implied that imposing a forfeiture of property on an owner free of any fault whatsoever regarding the wrongful use of his property would be making that person bear burdens which "in all fairness and justice" should "be borne by the public as a whole," and to that extent would constitute a compensable taking. Under this analysis, the Takings Clause prohibits the State from making Tina Bennis alone relinquish her property to pay for general fiscal obligations of the State or costs of local law enforcement for which she is in no way responsible.

The order granting forfeiture to the respondent directs the proceeds to be used to pay "the filing fee of this action," "attorney costs," and "all police costs," with "any remaining balance . . . [to] be paid to the general treasury of the State of Michigan." (J.A. 28). True law

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[18] As for *Pearson's* ruling on the facial challenge, that holding is readily distinguishable from the takings challenge to the section of the nuisance statute at issue here. *See infra*, pp. 32-33.

enforcement costs connected with a criminal proceeding may, consistent with the Takings Clause, be recouped from a convicted criminal's property or from the public generally. But the government cannot recover its costs of law enforcement by seizing without compensation property of any individual, who, like petitioner, is wholly innocent of the offense which necessitated the law enforcement costs. Nor can the State seize property without compensation from such a person simply to add to its "general treasury" for use in meeting fiscal obligations. Because she had neither committed nor been charged with any wrongdoing, for the State to take Tina Bennis's property (without compensation) was no more constitutional in this case than it would have been for the State to take the property of any other third person who had no involvement in John Bennis's offense.

B. The Michigan Statute Is Unconstitutional To The Extent It Authorizes The Taking Of Property Without Compensation From Non-Culpable Persons

The Michigan statute permits the direct appropriation of property of a wholly innocent person under the guise of nuisance abatement and as such authorizes a "per se" taking of property for a public use without compensation, in violation of the Fifth Amendment. And insofar as historical considerations are at all relevant to this issue, neither the history of nuisance abatement at common law, nor the history of *in rem* forfeitures of the kind at issue in *Pearson* provide a basis for suggesting that the statute is exempt from the requirements of the Takings Clause.

This Court's holding rejecting the facial challenge in *Pearson* is distinguishable from the facial challenge made here because the former rests on the view that *in rem* forfeiture statutes are not unconstitutional insofar as they apply to the property of persons innocent of *criminal* wrongdoing.[19] 416 U.S. at 683-684. The *Pearson* Court concluded on the basis of the background of *in rem* forfeiture statutes – and on the basis of several prior forfeiture decisions – that such applications of forfeiture statutes did not render them unconstitutional. But the Court simply did not decide the narrower issue of whether such statutes are constitutional if applied to persons who are not only innocent of criminal wrongdoing, but are also entirely free of any lesser culpability, including negligence. This case, by contrast, presents just that issue.

Pearson is distinguishable from this case in another important respect. The *in rem* forfeitures at issue in *Pearson* have historical underpinnings that are separate from those of public nuisance abatement statutes like Michigan's. *See Pearson*, 416 U.S. at 680-83. Thus, insofar as the *Pearson* rejection of the facial challenge was based on its reading of the history of *in rem* forfeitures, that history has no applicability to *in personam* forfeitures made pursuant to nuisance abatement statutes. Nuisance abatement has a distinct history in the common law, and that

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[19] This is what the *Pearson* Court meant when it stated that "the innocence of the owner of property subject to forfeiture has almost uniformly been rejected as a defense." 416 U.S. at 683 (discussing holding in *The Palmyra*, 12 Wheat. 1 (1827)); *see also Austin*, 125 L. Ed. 2d at 502 ("In *The Palmyra* [the Court] did no more than reject the argument that the criminal conviction of the owner was a prerequisite to the forfeiture of his property.").

history affords no support for the use of forfeiture remedies against innocent owners.

Nuisance abatement has its origins in the English common law. At early common law, public nuisances were a crime, whose abatement was almost exclusively a matter for the criminal courts. The jurisdiction of equity courts to abate public nuisances at the suit of the attorney general was a relatively late development in the English common law.[20] In America, "the practice of enjoining

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[20] According to the English legal historian Holdsworth, "It was recognized, certainly by the beginning of the sixteenth century, that a nuisance might be public and remediable by indictment, or private and remediable by action on the case at the suit of the person damaged thereby." 8 W. Holdsworth, *A History of English Law* 424 (1937). The earliest common or public nuisances were obstructions or encroachments to the King's highway, which were known as purprestures. *See* F. Newark, *The Boundaries of Nuisance*, 65 L. Quart. Rev. 480, 482 (1949); J. Brenner, *Nuisance Law and the Industrial Revolution*, 3 J. Legal Stud. 403, 421 (1974). Public nuisance misdemeanors later came to include such transgressions as omitting noxious vapors or fouling common water. *See* Brenner, *supra* at 421; *see also* J. Baker, *Introduction to English Legal History* 492 (1990). The range of offenses treated as public nuisances was also expanded by statute to cover such activities as maintaining bawdy houses, gaming houses and other disorderly houses. *See* 2 J. Oldham, *The Mansfield Manuscripts and the Growth of English Law in the Eighteenth Century* 884 (1992). Public nuisances were subject to both fines and abatement in the criminal courts, provided the offenses were shown to be continuing. *Id.* at 883. In addition to the criminal remedy, it was recognized in the sixteenth century that a private individual could maintain an action upon the case for a public nuisance, if he could show special injury. *See* Newark, *supra* at 482-83; Baker, *supra* at 493. But recovery of damages, rather than an order of abatement, was the only relief obtainable in an action upon the case for a public or private

[public] nuisances at the suit of the state . . . became established" during "the Nineteenth Century." H. McClintock, *McClintock on Equity* 441 (1948). But even after that jurisdiction became established here, the scope of activities that constituted public nuisances – and the remedies for them – were far more limited at common law than they are under the Michigan statute.

First, where the alleged nuisance was only injurious to the morals of the community, courts seldom granted injunctions in the absence of statutes declaring those activities to be nuisances. *See* McClintock, *supra* at 441.[21] In addition, equity courts usually required some showing of "continuing or recurring" conduct amounting to a nuisance before injunctive relief would be granted. *See* 1

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nuisance. *See* Oldham, *supra* at 886. It was not until the early 1700's that the Court of Chancery began granting injunctions to abate a private nuisance, *id.* at 886, and that Court did not regularly begin doing so until the end of the eighteenth century, *see* J. McLaren, *Nuisance Law and the Industrial Revolution-Some Lessons from Social History*, 3 Oxford J. Legal Stud. 155, 186 (1983). To the extent that English equity courts began to exercise a similar jurisdiction over public nuisances in the eighteenth century, that jurisdiction was sparingly invoked. *See* A. Rounds, *Injunctions Against Liquor Nuisances*, 9 Harv. L. Rev. 521, 522-24 (1896); H. Schofield, *Equity Jurisdiction to Abate and Enjoin Illegal Saloons as Public Nuisances*, 8 Ill. L. Rev. 19, 20-21 (1914).

[21] *See also People v. Lim*, 118 P.2d 472, 474-75 (1941) (discussing history of equitable remedy and concluding that "an action on behalf of the state . . . to enjoin activity which violates general concepts of public policy finds no basis in the doctrines of the common law"); *Hedden v. Hand*, 107 A. 285, 289 (1919) (reviewing English cases and stating that "gaming houses, bawdy houses and public nuisance of a like character . . . are . . . not within the cognizance of a court of equity") (citation omitted).

J. Pomeroy, *A Treatise on Equitable Remedies* § 513 at 863 (1905). And, finally, the remedy of "forfeiture" as it is used today is not one that was used by equity courts to abate nuisances. Instead, the usual remedy at common law was an injunction to abate the nuisance:

> The relief sought in equity against nuisance is, of course, preventive, either to prohibit the creation of a nuisance or to prevent an existing one from continuing in the future. Ordinarily, this end is achieved by a mere prohibitive injunction.

Pomeroy, *supra*, § 533 at 912-13. Such orders were to be carefully drawn so as "to prohibit only that part of the thing complained of which is injurious. . . . " *Id.* § 534 at 915. To be sure, where a mere prohibitive injunction would not accomplish the desired result, and removal or destruction of the nuisance was necessary to affording relief, a court of equity would issue a mandatory injunction providing for that relief. *See Id.* § 533 at 915. But the remedy of forfeiture, whereby the State simply appropriates property used to create a public nuisance – and either keeps it or sells it to other members of the public, who in turn re-use it – is a relatively recent statutory creation, with no support in the common law tradition. *A fortiori*, the use of forfeiture against innocent owners likewise finds no support in the common law.

In short, neither the history of *in rem* forfeiture discussed in *Pearson*, nor the history of nuisance abatement at common law provide support for broad forfeiture remedies of the kind available under the Michigan statute. Insofar as it is relevant, history does not provide any exception to the constitutional requirement that the State

pay just compensation when a statute authorizes takings of property belonging to entirely blameless persons. Section 3815(2) of the Act must be declared unconstitutional.

III. THE BURDEN OF PROOF ALLOCATION IN THE *PEARSON* DICTA SHOULD NOT APPLY TO PROCEEDINGS UNDER THE MICHIGAN NUISANCE ABATEMENT STATUTE

If this Court holds that the Michigan nuisance abatement statute is unconstitutional in that it permits forfeiture of an owner's property regardless of the presence or absence of culpability on that person's part, it should further clarify that the State must bear the burden of proving the owner's culpability.[22] The State currently bears that burden in cases where the person accused of misusing the property is its owner. *See* M.C.L.A. § 600.3825(1) ("[i]f the existence of the nuisance is established . . . "); (J.A. 53 (*Bennis* opinion) ("[w]e do not shift the burden of proof to [John Bennis] . . . ")). In its briefs before the Michigan Supreme Court, however, the State argued that if innocence were at all relevant to forfeitability, it should be made clear that the owner must bear the burden of proof on that issue. (*see* Plaintiff-Appellant's 6-9-94 Brief in the Michigan Supreme Court at 29). And even the constitutionally inadequate exemption from forfeiture formulated by the Michigan Supreme

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[22] Determining where that burden properly lies is not, however, necessary to resolve the "as-applied" constitutional challenge in this case. Regardless of who has the burden of proof on the issue, no reasonable trier of fact would conclude from the record below that Tina Bennis was culpable or blameworthy.

Court placed the burden of proving the exemption on the defendant. (J.A. 69) (stating that constitution allows forfeiture of an innocent person's property, "unless *evidence [is] submitted* that the property was stolen. . . . ") (emphasis added). A dissenting opinion also argued that the statute should be construed to place the burden of proving lack of knowledge on the defendant. (J.A. 94-95) (Levin, J., dissenting).

The issue of whether some culpability must be present before forfeiture can be effected and the issue of who has the burden of proof as to the presence or absence of that culpability are inextricably intertwined, both doctrinally and in practical terms. In protecting innocent persons from punishment, our legal tradition not only requires that an individual have some fault or culpability before punishment can be imposed. It also requires that punishment not be administered until the State has first satisfied its burden of proving that the individual engaged in a culpable act. Indeed, in criminal cases, due process makes that an absolute prerequisite to the imposition of punishment. *See, e.g., Chapman v. United States*, 500 U.S. 453, 465 (1991).

These two issues are also inseparable because shifting the burden of proof to the defendant will have the effect of eviscerating any substantive protection for innocents that this Court provides in applications of the Michigan nuisance abatement statute. *See Lavine v. Milne*, 424 U.S. 577, 585 (1976) ("Where the burden of proof lies on a given issue is, of course, rarely without consequence and frequently may be dispositive to the outcome of the litigation. . . . "). Thus, if a culpability standard corresponding to negligence in entrusting property is deemed to be

constitutionally required by this Court, and the State is then permitted to shift the burden to the owner, the ruling of this Court will have been largely nullified.

Although the *Pearson* dicta placed the burden of proving lack of culpability on the owner, that burden allocation was in the context of an *in rem* forfeiture, where the burden is usually on the owner. Petitioner contends that, whatever the proper rule is for *in rem* proceedings of the kind involved in *Pearson*, under either the Due Process Clause or the Takings Clause the burden of proving the constitutionally required degree of culpability must remain with the State in *in personam* forfeitures effected under the Michigan nuisance abatement statute.

A. Due Process Requires That The Burden Of Proving Culpability Be On The Government In Cases Arising Under The Michigan Nuisance Abatement Statute

Determining who has the burden of proof on a particular issue is as fundamental to the fairness of a proceeding – and to its outcome – as the selection of the appropriate standard of proof that must be met by whoever has the burden. Like the choice of the applicable standard of proof, the allocation of the burden of proof influences the relative frequency of the two types of factfinding error that can occur in judicial proceedings. *Cf. In re Winship*, 397 U.S. 358, 371 (1970) (Harlan J., concurring) (discussing effect of use of different standards of proof on factfinding error). In the context of actions brought under the Michigan nuisance abatement statute, those two types of error would be the error that a

wholly innocent person will be punished by confiscation of his or her property, and the error that a negligent person will escape that sanction.

With respect to the standard of proof in civil actions brought by the government against individuals, this Court has said that whether due process requires that the government be subject to a higher than usual standard "reflects not only the weight of the private and public interests affected, but also a societal judgment about how the risk of error should be distributed between the litigants." *Santosky v. Kramer*, 455 U.S. 745, 755 (1982). This Court has held that "fundamental fairness" requires that the government bear the "clear and convincing" standard of proof, rather than the usual "preponderance of the evidence" standard in a variety of civil contexts. *Id.* at 756-57 (mentioning cases). In those cases, the government already had the burden of proof, and the only question was how stringent that burden should be. It is manifestly clear that in civil proceedings in which the government seeks the confiscation of property the question of who has the burden of proof is as crucial to determining the "fundamental fairness" of the proceeding as was the standard of proof issue raised in *Santosky* and the cases cited therein.[23]

Inasmuch as the Court has employed the three-factor test of *Mathews v. Eldridge*, 424 U.S. 319 (1976) to evaluate whether a given standard of proof comports with due

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[23] In *Santosky*, the Court held that due process requires that a State prove its allegations by at least the "clear and convincing" standard of proof in a proceeding to terminate the rights of parents in their natural children. 455 U.S. at 747-48.

process, that test is appropriate for determining whether the government must bear the burden of proving owner culpability under the Michigan nuisance abatement statute. *See Santosky*, 455 U.S. at 757; *see also United States v. James Daniel Good Real Property*, 510 U.S. ___, 126 L. Ed. 2d 490, 503 (1993) (using three-part *Mathews* test to evaluate constitutionality of *ex parte* seizure of property subject to civil forfeiture). The *Mathews* analysis requires consideration of "the private interest affected by the official action; the risk of an erroneous deprivation of that interest through the procedures used, as well as the probable value of additional safeguards; and the Government's interest, including the administrative burden that additional procedural requirements would impose." *Id.* at 503.

An individual's right to be free from arbitrary takings of his personal property, no less than his real property, is "a private interest of historic and continuing importance." *James Daniel Good Real Property*, 126 L. Ed. 2d at 503; *see also id.* at 521 (Thomas, J., concurring in part and dissenting in part). The particular kind of property seized in this case – an automobile – is an essential part of modern life. For most Americans, some form of ownership in an automobile is a necessity of life and to many people an automobile is their most important and valuable personal possession. Automobiles provide "access to jobs, schools, and recreation as well as to the daily necessities of life." *Coleman v. Watt*, 40 F. 3d 255, 260-61 (8th Cir. 1994).

The automobile offers a perfect illustration of the fundamental interdependence between property rights and individual liberties remarked on in *James Daniel Good Real Property*, 126 L. Ed. 2d at 508 (1993), and *Lynch v.*

Household Finance Corp., 405 U.S. 538, 552 (1972). To a greater extent than perhaps any other personal property, "to deprive an individual of . . . [an automobile] is to deprive him of a measure of his autonomy. . . . " *United States v. Twelve Thousand, Three Hundred Ninety Dollars*, 956 F. 2d 801, 810 (8th Cir. 1992) (Beam, J., dissenting in part). Thus, as in *James Daniel Good Real Property*, "the private interests at stake weigh heavily in the *Mathews* balance." 126 L. Ed. 2d at 504.

As for the second *Mathews* factor, both Justice Harlan's analysis in *In re Winship* and the Court's observation in *Lavine* that burden of proof allocations are frequently outcome determinative leave no doubt that the risk of an erroneous deprivation would be increased significantly by placing the burden of proof on the defendant. Presuming a person "guilty," rather than "innocent" in this context would be especially likely to lead to erroneous deprivations because of the nature of the standard of culpability involved. An owner would have to prove a negative – namely, that he or she was not negligent in entrusting property, or did not know that the user was likely to engage in an illegal use of the property. By its very nature, the kind of evidence that will disprove negligence or knowledge can be extremely difficult to acquire. The government, on the other hand, would be required to prove nothing about the owner's negligence or knowledge. Finally, the increased legal costs incurred by parties who bear the burden of proof in judicial proceedings, along with the difficulties of proof, would deter some truly innocent owners from even mounting a defense.

The third *Mathews* factor is the "[g]overnment's interest, including the function involved and the fiscal and

administrative burdens that the additional or substitute procedural requirement would entail." *James Daniel Good Real Property*, 126 L. Ed. 2d at 504. Placing the burden of proof on the government to show culpability in cases where the owner entrusts his or her property to another will have little, if any, adverse impact on the government. Under the Michigan nuisance abatement statute, the State already has that burden with respect to cases in which the owner is the same person who misuses the property. There is no weighty governmental interest supporting different burden allocations in the two classes of cases. Finally, the purpose of a nuisance abatement proceeding is to prevent a particular misuse of property, which can be accomplished by injunctive relief. Insofar as the government also has an interest in punishing the person who created the nuisance, that interest can in any event be met through criminal actions like the one that was brought against petitioner's husband.

The conclusion that the burden should be with the State applies with particular force here because of the quasi-criminal nature of proceedings under the Michigan nuisance abatement statute. Respondent in effect acknowledged in its brief in the Michigan Supreme Court proceedings below that nuisance abatement actions of the kind involved here are the functional equivalent of a criminal proceeding. *See supra*, pp. 20-21. Therefore, the presumption of innocence that applies in criminal proceedings should apply here as well. *See Foucha v. Louisiana*, 504 U.S. at 94 (1992) (Kennedy, J., dissenting) ("We would not allow a State to evade its burden of proof by replacing its criminal law with a civil system in which there is no presumption of innocence and the defendant

has the burden of proof."). For this additional reason, due process requires that the state bear the burden of proof on the issue of culpability.

B. In A "Per Se" Takings Case, The Government Has The Burden Of Proving Any Exception To The Requirement To Pay Just Compensation

This Court's recent takings jurisprudence provides an alternative basis for concluding that the burden of proving culpability must be with the government in the context of nuisance abatement proceedings brought against defendants like Tina Bennis. In *Lucas v. South Carolina Coastal Council*, 505 U.S. ___, 120 L. Ed. 2d 798 (1992), this Court made clear that, in cases involving "per se" regulatory takings, the burden is on the government to prove any applicable exception to the requirement of paying compensation. *Id.* at 813 n.6. Even in the case of conditional takings, in which the government requires a landowner to deed portions of his or her land as a condition for receiving permission to make certain uses of the land, this Court has held that the government has the burden of "justify[ing] the required dedication." *See Dolan v. City of Tigard*, 129 L. Ed. 2d at 320 n.8.

Since forfeiture involves the taking of title by the government to a particular item of property, the government *a fortiori* must bear the burden of establishing that such a taking is not compensable under the Takings Clause.[24] Thus, in any case arising under the Michigan

[24] After setting forth its dicta concerning innocent owners, the Court in *Pearson*, citing *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962), stated that "in this case appellee voluntarily entrusted the lessees with possession of the yacht, and no allegation has been made or proof offered that the company did all that it reasonably could to avoid having its property put to an unlawful use." 416 U.S. at 690. In *Goldblatt*, the Court held that an ordinance regulating dredging and pit excavation within the town limits did not, as applied to appellants, amount to a compensable regulatory taking under the Takings Clause. 369 U.S. at 594. The Court, emphasizing that appellants had the burden on the issue, also held that they had failed to establish that this regulation was not a reasonable exercise of the State's police power. *Id.* at 596. The Court's recent decisions in *Dolan* and *Lucas* preclude *a fortiori* any reliance on *Goldblatt* regarding the appropriate burden allocation for cases like this one involving direct appropriations of property. *See Dolan*, 129 L. Ed. 2d at 320 n.8; *Lucas*, 120 L. Ed. 2d at 813 n. 6.

nuisance abatement statute, the government must establish the constitutionally required degree of culpability before it can forfeit the owner's property. In cases in which the government seeks forfeiture of an owner's property based on another person's misuse, that standard of culpability is negligence in entrusting the property.[25]

[25] The burden allocation suggested in the *Pearson* dicta arose in the context of *in rem* forfeitures, where there is some historical precedent for the burden shift. The practice of placing the burden of proof on a property owner in *in rem* forfeiture proceedings has been traced to the English Navigation Acts of the seventeenth century. *See* Note, *Due Process Implications of Shifting the Burden of Proof in Forfeiture Proceedings Arising out of Illegal Drug Transactions*, 1984 Duke L. J. 821 (1984) (hereafter cited as "Note, *Due Process Implications*"). These acts required the shipping of most commodities in English vessels. *See Austin*, 125 L. Ed. 2d at 499 (discussing forfeiture imposed under English Navigation Acts). Both the "illegally carried goods as well as the ship that carried them" were subject to forfeiture

CONCLUSION

For all of the foregoing reasons, the judgment of the Michigan Supreme Court as to petitioner should be reversed.

Respectfully submitted,

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upon a violation of the Act. *Id.* at 499. Obtaining jurisdiction over shipowners (some of whom were undoubtedly not English nationals) to enforce these laws was difficult. *See* Note, *Due Process Implications* at 825. The use of *in rem* proceedings, in which the ship itself was seized to satisfy a claim, and in which the burden of proof was on the vessel's owner, alleviated that problem. *Id.* The First Congress "passed laws subjecting ships and cargos involved in customs offenses to forfeiture," *Austin*, 125 L. Ed. 2d at 500, and these, too, contained the burden-shifting feature, *see* Note, *Due Process Implications* at 825-26 (1984). The current customs forfeiture statute in the United States Code shifts the burden of proof to the owner of seized goods. 19 U.S.C. § 1615. That burden-shifting provision has, *inter alia*, been incorporated in the federal drug forfeiture statute by subsection (d) of 21 U.S.C. § 881, which served as the model for the Puerto Rican statute at issue in *Pearson*. *See* note 6, *supra*. Whatever relevance the history of *in rem* statutes may have to the constitutionality of burden shifting under *in rem* forfeitures of the kind involved in *Pearson*, it clearly has no relevance to the constitutionality or propriety of burden-shifting in a proceeding arising under a nuisance abatement statute.

APPENDIX

Sections 3801, 3805, 3815, 3825, 3830, and 3835 of the Michigan Public Nuisance Statute, as codified in Michigan Complied Laws Annotated, provide as follows:

600.3801. Declared nuisances; abatement

Sec. 3801. Any building, vehicle, boat, aircraft, or place used for the purpose of lewdness, assignation or prostitution or gambling, or used by, or kept for the use of prostitutes or other disorderly persons or used for the unlawful manufacture, transporting, sale, keeping for sale, bartering, or furnishing of any controlled substance as defined in section 7104 of the public health code, Act No. 368 of the Public Acts of 1978, being section 333.7104 of the Michigan Compiled Laws, or of any vinous, malt, brewed, fermented, spirituous, or intoxicating liquors or any mixed liquors or beverages, any part of which is intoxicating, is declared a nuisance, and the furniture, fixtures, and contents of the building, vehicle, boat, aircraft, or place and all intoxicating liquors therein are also declared a nuisance, and all controlled substances and nuisances shall be enjoined and abated as provided in this act and as provided in the court rules. Any person or his or her servant, agent, or employee who owns, leases, conducts, or maintains any building, vehicle, or place used for any of the purposes or acts set forth in this section is guilty of a nuisance.

600.3805. Action to abate; parties

Sec. 3805. The attorney general of the state of Michigan, the prosecuting attorney or any citizen of the county, may maintain an action for equitable relief in the name of the state of Michigan, upon the relation of such attorney general, prosecuting attorney or citizen to abate said nuisance and to perpetually enjoin any person, his servant, agent, or employee, who shall own, lease, conduct or maintain such building, vehicle, boat, aircraft or place, from permitting or suffering such building, vehicle, boat, or aircraft or place owned, leased, conducted or maintained by him, or any other building, vehicle, boat, aircraft or place conducted or maintained by him to be used for any of the purposes or by any of the persons set forth in section 3801,[1] or for any of the acts enumerated in said section. When the injunction has been granted, it shall be binding on the defendant throughout the judicial circuit in which it was issued.

[1]Section 600.3801.

600.3815. Admissible evidence; unnecessary proof; judgment and order

Sec. 3815. (1) In any action brought under this chapter, evidence of the general reputation of the building, vehicle, boat, aircraft or place is admissible for the purpose of proving the existence of the nuisance.

(2) Proof of knowledge of the existence of the nuisance on the part of the defendants or any of them, is not required.

(3) It is not necessary for the court to find the property involved was being used as and for a nuisance at the time of the hearing, or for the plaintiff to prove that the nuisance was continuing at the time of the filing of the complaint, if the complaint is filed within 30 days after any act, any violation, or the existence of a condition herein defined as a nuisance, but on finding that the material allegations of the complaint are true, the court shall render judgment and order of abatement as hereinafter provided.

600.3825. Order of abatement; closing of building, removal of contents, sale; contempt

Sec. 3825. (1) **Order of abatement.** If the existence of the nuisance is established in an action as provided in this chapter, an order of abatement shall be entered as a part of the judgment in the case, which order shall direct the removal from the building or place of all furniture, fixture and contents therein and shall direct the sale thereof in the manner provided for the sale of chattels under execution, and the effectual closing of the building or place against its use for any purpose, and so keeping it closed for a period of 1 year, unless sooner released as in this chapter provided.

(2) **Vehicles, sale.** Any vehicle, boat, or aircraft found by the court to be a nuisance within the meaning of this chapter, is subject to the same order and judgment as any furniture, fixtures and contents as herein provided.

(3) **Sale of personalty, costs, liens, balance to state treasurer.** Upon the sale of any furniture, fixtures, contents, vehicle, boat or aircraft as provided in this section,

the officer executing the order of the court shall, after deducting the expenses of keeping such property and costs of such sale, pay all liens according to their priorities which may be established by intervention or otherwise at the hearing or in other proceedings brought for that purpose as being bona fide and as having been created without the lienor having any notice that such property was being used or was to be used for the maintenance of a nuisance as herein defined, and shall pay the balance to the state treasurer to be credited to the general fund of the state.

(4) **Use of closed building; contempt**. If any person uses a building or place so directed to be closed, with knowledge that such building or place is closed by order of the court, he shall be punished as for contempt, as provided in section 3820.[1]

[1]Section 600.3820.

600.3830. Removal and sale of property, fees; closing of building; loss of exemptions; liability of officers

Sec. 3830. (1) **Fees**. For removing and selling the movable property, the officer is entitled to charge and receive the same fees as he would for levying upon and selling like property upon execution, and for closing the building or place and keeping it closed, a reasonable sum shall be allowed by the court.

(2) **Loss of property exemptions; liability of officers.** Any person found guilty of maintaining a nuisance under the provisions of this chapter shall forfeit the benefit of all property exemptions, so far as the satisfaction of

the order or judgment of the court requires the same, and the taking and disposing of any property of the defendant or defendants by virtue of such order or judgment by any officer directed to execute the same is not a trespass, nor shall such officer be liable either civilly or criminally therefor, if a proper return of such order or judgment and accounting for such property is made to the court within 10 days after the order or judgment is executed.

600.3835. Proceeds of sale of personalty, application

Sec. 3835. The proceeds of the sale of the personal property, as provided in section 3830,[1] shall be applied in payment of the costs of the action and abatement, and the balance, if any, shall be paid to the persons entitled thereto as the court may direct.

[1]Section 600.3830.

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QUESTIONS PRESENTED

I.

WHETHER EQUITABLE FORFEITURE OF A CO-OWNER'S INTEREST IN AN AUTOMOBILE, FOUND TO HAVE BEEN USED IN NUISANCE CONDUCT CONTRARY TO MICHIGAN'S NUISANCE ABATEMENT STATUTE, IS A "TAKING" REQUIRING JUST COMPENSATION SINCE THE STATE LAW, A VALID ENACTMENT UNDER MICHIGAN'S POLICE POWERS, FURTHERS INTERESTS OF THE PUBLIC BY REASONABLE MEANS, AND IN APPLICATION, AFFECTS A MINIMAL NUMBER OF INDIVIDUALS SUCH AS PETITIONER; and

II.

WHETHER DUE PROCESS OF LAW AND THE TAKINGS CLAUSE OF THE FIFTH AMENDMENT ARE VIOLATED BY APPLICATION OF MICHIGAN'S NUISANCE ABATEMENT LAW TO A CO-OWNER OF A VEHICLE, WHICH OWNERSHIP INCLUDES A RESPONSIBILITY TO PREVENT, OR ANSWER FOR, COMMUNITY HARM CAUSED BY THE OTHER CO-OWNER'S MISUSE OF THE VEHICLE, WHERE OTHER STATUTES INCLUDE AN AFFIRMATIVE RESPONSIBILITY TO PREVENT, OR ANSWER FOR, INDIVIDUAL HARM CAUSED BY MISUSE OF A VEHICLE OR IMPOSE STRICT LIABILITY, IRREGARDLESS OF INTENT, INNOCENCE OR EXERCISE OF CARE AND THOSE LAWS ARE CONSTITUTIONAL IN APPLICATION.

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IN THE SUPREME COURT OF
THE UNITED STATES
OCTOBER TERM, 1995
NO: 94-8729

TINA B. BENNIS,

Petitioner,

vs.

STATE OF MICHIGAN,
ex rel. WAYNE COUNTY PROSECUTOR,

Respondent.

On Writ of Certiorari to the
Supreme Court of Michigan

STATEMENT OF THE CASE

In his opening statement, Mr. Bennis' attorney said the prosecution would not be able to show acquiescence by Tina Bennis. (TR-40).

During questioning of John Bennis by the prosecutor, Mr. Bennis asserted his Fifth Amendment right against self incrimination. (TR-50).

Testimony from a police officer indicated that during his surveillance in the area, he saw Kathy Polarchio flagging cars, waving her hands at them, for 10-15 minutes. The "flagging" was a known procedure used by prostitutes to cause customers to stop. (TR-61-63)

After John Bennis was seen stopping and allowing Ms. Polarchio to enter his car, the police followed him to a residential area, midway in the block, where his car stopped and the lights were turned off. (TR-63-65) After the police stopped behind the Bennis' auto, two heads were seen: a female on the right, a male on the left. Seconds later, the female head went down, disappearing toward the drivers side. (TR 65-66)

When the officer observed John Bennis and Kathy Polarchio engaged in fellatio in the Bennis' car, John Bennis had his pants pulled down. (TR-67)

After stating he had lots of complaints about prostitution in the Eight Mile Rd. area, the officer testified Ms. Polarchio had arrests for accosting and soliciting, indecent and obscene conduct, disorderly conduct-flagging, and disorderly conduct. The witness indicated he had assisted in numerous arrests in the area for prostitution. (TR-72-73)

Five residents then told the court of their exposure to the prostitution in the neighborhood: by seeing it or by being solicited for prostitution. (TR-90-141)

The last prosecution witness said that during his job as security for a nearby restaurant, he had seen John Bennis apparently trying to pick up prostitutes twice before. (TR-143-152)

During Tina Bennis' testimony, she told the court she and John Bennis had another car - a 1978 Olds - in addition to the 1977

Pontiac at issue. (J.A.11, TR-156)

In closing argument, the prosecutor cited a Michigan appellate case which concerned the guilty actions of a vehicle's co-owner "wiping out" the ownership interest of the "non-knowing" owner. (TR-164)

In its findings of fact, the trial judge said he was confining the decision to the facts of this case. (J.A. 13, TR-178) He was not going to take every car involved in prostitution, and he did not know what he would do with co-title owners: he would handle them on a case-by-case basis. (J.A. 13,27, TR-179,188) The judge explained he would exercise discretion: he might order one-half of the balance (after sale) to go to the innocent owner. He also opined that the civil remedy was designed to address the broader problem of public nuisance. (J.A. 22, TR-188-189) As to Tina Bennis' interest, the court said there would be

practically nothing left minus the costs. The car was to be sold, costs were to be deducted, and any balance was to go to the State of Michigan. (J.A. 25-26, TR-193-194)

Caselaw interpretations of Michigan's nuisance abatement statute have underscored the equitable nature of relief which might be granted. (See cases presented in respondent's brief, infra)

Nowhere in pleadings filed by appellants (John and Tina Bennis) in the Michigan Court of Appeals were there any arguments presented on constitutional issues. Only in appellees' brief in the Michigan Supreme Court did counsel for petitioner plead, and orally argue, the due process - innocent owner constitutional claim.

All justices who wrote or signed opinions in the Michigan Supreme Court

decision found no merit to constitutional claims made by Tina Bennis. (J.A. 45, et seq)

In the petition for certiorari filed in this Court, petitioner did not raise any argument as to burden of proof.

SUMMARY OF ARGUMENT

This matter arose from the nuisance use of a 1977 Pontiac, co-owned by John and Tina Bennis. John Bennis was arrested for gross indecency while he and a known prostitute were engaged in fellatio in that car. Under Michigan's nuisance abatement laws, a vehicle found to be a nuisance, or used to further "lewdness, assignation or prostitution..." (MCL 600.3801; MSA 27A.3801), may, after a trial in a court of equity be abated or sold to stop the nuisance.

Petitioner Tina Bennis claimed at the abatement trial that she had no knowledge of her husband's misuse of the car and, thus, her interest should not be abated or forfeited. The trial court, exercising equity discretion, concluded that a case-by-case analysis should be used and that, in the Bennis case, after deductions would be

made for expenses and costs as provided by law, petitioner's one half interest would be minimal. The trial judge also recognized that the state law did not require knowledge on the part of a defendant.

In the Michigan Supreme Court, petitioner's claims of a denial of due process and that the abatement was a compensable taking were denied. The majority opinion's reliance on Pearson Yacht and Van Oster was proper, given the similarity of those matters to the context of this cause, and the lack of controlling precedent from other courts.

The police powers of a state support constitutional enactments such as Michigan's nuisance abatement law, where the means delineated are reasonably necessary for the accomplishment of the purpose: protection of public safety, health and morals, and the

application of the law is not unduly oppressive on individuals.

The existence of strict liability laws, which expose innocent owners to liability for actions of others, requires affirmance of Michigan's nuisance abatement law, as applied and as written.

ARGUMENT

EQUITABLE FORFEITURE OF A CO- OWNER'S INTEREST IN AN AUTOMOBILE, FOUND TO HAVE BEEN USED IN NUISANCE CONDUCT CONTRARY TO MICHIGAN'S NUISANCE ABATEMENT STATUTES, IS NOT A "TAKING" REQUIRING JUST COMPEN- SATION UNDER CONSTITUTIONAL LAW SINCE THE LAW, A VALID ENACTMENT WITHIN THE STATE'S POLICE POWERS, FURTHERS PUBLIC INTERESTS BY REASONABLE MEANS AND, IN APPLICATION, IS NOT UNDULY OPPRESSIVE.

After John Bennis was found by Detroit police to have used the 1977 Pontiac co-owned by himself and his wife, Tina Bennis, (petitioner), in prohibited criminal and nuisance conduct[1], the Wayne County Prosecutor's Office filed a nuisance abatement action in circuit court. At trial, petitioner testified as to her lack of knowledge of the nuisance conduct involving

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1 Mr. Bennis and the prostitute who was performing fellatio on him were charged criminally with gross indecency, MCL 750.335; MSA 28.567. That the automobile was used in furtherance of that conduct subjected both Mr. Bennis and the vehicle to possible civil abatement (sale) of the car and a permanent injunction against defendant Bennis. MCL 600.3825; MSA 27A.3825.

the co-owned vehicle, and the trial judge, exercising his discretion as a court of equity, indicated petitioner's one-half interest in the car (ca.$300) would be so minimal after costs and expenses were deducted (when the car was sold) that he would order her interest forfeited. He indicated each case would be viewed on its facts. (J.A. 25-26)

An order was entered by the trial judge, and the vehicle was sold at public auction.

A. No "taking" occurred where the vehicle was not seized for public use.

The Michigan Constitution of 1963, Article 10, Section 2, entitled "Eminent domain; compensation" reads:

> Sec. 2 Private property shall not be taken for public use without just compensation therefor being first made or secured in a manner

> prescribed by law. Compensation shall be determined in proceedings in a court of record.

Within the Fifth Amendment to the U.S. Constitution is found the relevant phrase:

> ...nor shall private property be taken for public use, without just compensation.

That provision, in conjunction with the same statement in Michigan's Constitution, is claimed by petitioner to have been violated in the context of this cause. Because no taking for public use occurred, both provisions are inapplicable.

In Penn Central Transportation Company v City of New York, 438 U.S. 104, 98 S.Ct 2646, 57 L.Ed.2d 631 (1978), this Court held that the application of New York's Landmarks Law to property owned by the Grand Central Terminal did not constitute a "taking" within the meaning of the Fifth Amendment.

The zoning laws and land-use regulations at issue in Penn Central were said by the Court to be examples of programs that might adversely affect economic values without constituting a "taking". Further the Court explained, zoning laws attacked in court may be found to be reasonable enactments affecting "the health, safety, morals, or general welfare" which were proper although prohibiting particular contemplated uses of land. Even though land-use regulations destroy or adversely affect real property interests, they may be upheld where they serve a substantial public purpose.[2]

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2 Cited in Penn Central, supra, were Goldblatt v Hempstead, 369 U.S. 590, 82 S.Ct. 987, 8 L.Ed.2d 130 (1962), involving the affirmance of a town ordinance regulating dredging and pit excavating as a valid police regulation as applied to the defendants' property; and Hadacheck v Sebastian, 239 U.S. 394, 36 S.Ct. 143, 60 L.Ed. 348 (1915): affirming a municipal ordinance, enacted as a police measure, prohibiting brickmaking within a designated area, as not taking

The Court recognized the need in Penn Central to review factors involved in interpretation of the takings clause. At 98 S.Ct. 2659, this Court explained:

> The question of what constitutes a "taking" for purposes of the Fifth Amendment has proved to be a problem of considerable difficulty. While this Court has recognized that the "Fifth Amendments's guarantee ...(is) designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole," Armstrong v United States, 364 U.S. 40, 49, 80 S.Ct. 1563, 1569, 4 L.Ed.2d 1554 (1960), this Court, quite simply, has been unable to develop any "set formula" for determining when "justice and fairness" require that economic injuries caused by public action be compensated by the government, rather than remain disproportion- ately concentrated on a few persons. See Goldblatt v Hempstead, 369 U.S. 590, 594, 82 S.Ct. 987, 990, 8 L.Ed.2d 130

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2 (Cont'd)
without due process of law the property of the owner of a tract of land within the prohibited area, although the land had clay-deposits suitable for brick-making which could not be removed to elsewhere, and the owner had used the land for brickmaking.

> (1962). Indeed, we have frequently observed that whether a particular restriction will be rendered invalid by the government's failure to pay for any losses proximately caused by it depends largely "upon the particular circumstances (in that) case." United States v Central Eureka Mining Co., 357 U.S. 155, 168, 78 S.Ct. 1097, 1104, 2 L.Ed.2d 1228 (1958). (Emphasis added).

The "particular circumstances" of this case show that petitioner, by the equitable abatement of the co-owned vehicle, was not forced to bear a "public burden", but, rather, that she, after notice and opportunity to be heard, was subjected to loss of her interest in the nuisance vehicle, after the court said it would decide such matters case-by-case, and after he reasoned that her $300 interest would be severely depleted by the expenses and costs which would be applicable per law.[3] (J.A. 25-26)

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3 MCL 600.3825 (3); MSA 27A.3825(3) requires "expenses of keeping such property" and the "costs of such sale"

Equally important for consideration is the fact there was no taking for "public use". Unlike cases involving either condemnation or restriction of private property use to benefit the public, e.g. Penn Central, supra; Dolan v Tigard, 512 U.S. ---, 114 S.Ct. 2309, 129 L.Ed.2d 304 (1994) (property to be used for pathway); Lucas v South Carolina Coastal Council, 505 U.S. ---, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992) (denying development of coastal-zone land),[4] this matter was culminated by legislatively-required sale of the property ordered abated. The only "public" benefit from the sale was nuisance abatement. The car was sold and the proceeds disbursed as required by law.[5]

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3 Cont'd
to be deducted from sale proceeds, after which the remainder is to be paid to the state treasurer.

4 Most "takings" cases involve real property rather than vehicles; thus the logical ease with which the term "public use" is applied. See, for example, Hadacheck and Lucas, supra.

5 Under the "police power" argument,

(This is not to say each time a vehicle is the subject of a nuisance abatement cause, it must be sold. In prior cases, Michigan's courts, exercising equity jurisdiction, have ordered less than sale of the vehicle, see People v Tate, 306 Mich 667, 669, 11 N.W.2d 282 (1943) (5 month non-use of vehicle), or padlock of the building or place, see State v Bernstein, 57 Mich App 204, 206, 226 N.W.2d 56 (1974) (building could open after certain time).

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5 infra, the nuisance abatement law seeks to uphold the public good rather then punish an individual. The problem addressed by nuisance laws is the chronic blight nuisance conduct perpetuates on a community and its components. By providing for a remedy in addition to possible criminal charges, a state or municipality seeks another legal avenue to eradicate the problem. As this Court said in Stanley v Illinois, 405 US 645, 656, 92 S.Ct., 1208 31 L.Ed.2d 551 (1972), "The establishment of prompt efficacious procedures to achieve legitimate stated ends is a proper state interest worthy of cognizance in constitutional adjudication." Michigan's nuisance abatement law is such an "efficacious procedure".

B. Since the nuisance abatement proceeding is a matter tried in equity, abatement by sale of a vehicle found to be a nuisance is not the rule: the court may fashion a remedy to fit the problem.

Faced with interpretation of the apparent mandatory language of MCL 600.3825; MSA 27A.3825, directing padlock of a building or place found to be a nuisance, or directing sale of a vehicle likewise found to be a nuisance, the Michigan Supreme Court in People v Holschuh, 235 Mich 272, at 275-276, 209 N.W.158, (1926) stated (in pertinent part):

> ...The inherent powers of the court of equity are safeguarded by the Constitution and are not subject to be brushed aside or rendered supine by legislative mandate. ... The court will enforce valid legislation and its powers will respond thereto, but when legislation seeks to control judicial action to the extent of dictating the substance of decrees and forbidding any lesser degree of restraint, regardless of equity and justice, there is a departure from legislative power and an unwarranted interference with judicial power.

Further, the Michigan high court held

the nuisance law did not mandate padlocking the entire premises at issue and selling the furniture and fixtures, but rather only the contents of the exact place employed in violating the law were to "be seized and sold." (Id, at 276.)

The Holschuh court also upheld the circuit judge's action in refusing to lock the building for one year. (Id, at 277.)

An equity court has the power to enjoin a nuisance. It is the policy of courts, however, to tailor the remedy to the problem before the court. (See Norton Shores v Carr, 81 Mich App 715, 724, 265 N.W. 2d 802 (1978)).

The trial record here clearly reveals the court recognizing and exercising proper equity power in addressing the problem before it. The court indicated nuisance vehicle cases might be addressed case-by-case, and that the results of each matter

could vary. (J.A. 26) Then the judge looked to the facts of this case and fashioned an appropriate remedy. As the Michigan Supreme Court held on this point, at p.742 of Michigan v Bennis, 447 Mich 719, 527 N.W.2d 483 (1994): "...We merely sanction the trial judge's action, which is clearly permitted under the nuisance abatement statute, and find that such action was not an abuse of discretion."

In affirming, a reviewing court should restate that this nuisance abatement action was an equity matter and that sale of any interest in a vehicle, found to fall within the prohibitions of the statute, is not mandated but is discretionary, the matters being decided case-by-case.[6]

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[6] Although not in the record before the Court, it may be instructive to point out that since the re-institution

Sale of a co-owner's interest is not required by a court of equity in Michigan in a nuisance abatement action. In application the statute is fair.

C. The broad concept of a state's police powers may encompass an isolated situation where a private individual sustains harm in proper enforcement of valid state laws.

"It (police power) is universally conceded to include everything essential to the public safety, health, and morals, and to justify the destruction or abatement, by summary proceedings, of whatever may be regarded as a public nuisance." Lawton v Steele, 152 U.S. 133, 14 S.Ct. 499, 38 L.Ed. 385, 388 (1894).

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[6] Cont'd
of the vehicle seizure program in Wayne County after Bennis was decided in December, 1994, over 1500 vehicles have been seized. [January to September, 1995] Only four trials have been set, and none have involved a co-owner situation as here.

At issue in Lawton was the constitutionality of a New York law forbidding the use of fishing nets within one mile of shore of certain named waters. The statute declared the net to be a public nuisance which might be "...abated and summarily destroyed by any person". Id, at 38 L.Ed.388.

This Court, in reaching the conclusion that the act was constitutional, spoke at length as to what the term police power entailed. After giving examples of application of the police power, the majority opinion explained:

> "...The state may interfere whenever the public interests demand it, and in this particular a large discretion is necessarily vested in the legislature to determine, not only what the interests of the public require, but what measures are necessary for the protection of such interests. (Cases cited omitted.) To justify the state in thus interposing its authority on behalf of the public, it must appear first, that the interests of the public generally,

> as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals. ...In other words, it's (legislature) determination as to what is a proper exercise of its police powers is not final or conclusive, but is subject to the supervision of the court." Id, at 38 L.Ed., 388-389. (Emphasis added)

The Court then upheld the action of the state officials in seizing the nets as nuisances and summarily destroying them.

By comparison to Lawton, the context of this case should make it clear that Michigan's nuisance abatement laws as applied provide due process of law for those affected, address a public interest requiring state interference (perpetuation of nuisance conduct), and provide means to address the interest which are reasonably necessary for the accomplishment of the purpose.

The legislature recognized that the problem of several forms of nuisance conduct

could only be attacked by abatement laws which focused attention on the building, place, or vehicle involved in nuisance matters.[7] That there existed criminal laws dealing with the same conduct punishing individuals clearly did not (and does not) solve the problem.

Michigan's nuisance abatement laws were enacted to address the nuisance conduct, and the means by which it was perpetuated.

Initially, the laws dealt with "lewdness, assignation or prostitution", gambling, and illegal sales/dealings in alcoholic beverages.[8] As the mores of the times changed, so, too, did the nuisance law. It was amended to include activities

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7 This is in conjunction with any applicable criminal statutes Michigan has enacted, whose goal is punishment of the individual committing the nuisance act. See, for example MCL 750.301; MSA 28.533 et seq. dealing with gambling.

8 See People v Tate, supra; People v Bitonti, 306 Mich 115; 10 N.W.2d 319 (1913) both dealing with

dealing with controlled substances. Now, Michigan's nuisance abatement laws aim at solutions to public problems by targeting the means with which individuals commit the nuisance conduct.[9]

Because the means targeted by the law are property owned or controlled by one or more persons, there arises the possible constitutional conflict of government versus

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8 Cont'd
others using an auto in nuisance conduct, and the acts being abated; People v Bernstein, supra, where a bar was closed because of prostitution activity; and State v Levanburg, 406 Mich 455; 280 N.W.2d 810 (1979), involving assignation for prostitution.

9 As stated in Kingsley Books v Brown, 354 U.S. 436, 77 S.Ct. 1325, 1 L.Ed.2d 1464 (1957), at 1 L.Ed; 2d 1474:

> It is not for the United States Supreme Court to limit a state in its resort to various weapons in the armory of the law; whether proscribed conduct is to be visited by a criminal prosecution, or by a qui tam action, or by an injunction, or by some or all of

property rights. Do an individual's property rights outweigh a government's ability to exist? The answer is "No".

The Tenth Amendment of the U.S. Constitution confers upon the states the broad police power to enact statutes such as Michigan's nuisance abatement laws. Thus, property rights are not absolute, but must bend in a reasonable manner to the legitimate enactments of government.

In Nebbia v New York, 291 U.S. 502, 54 S.Ct. 505, 78 L. Ed. 940, 948-949 (1934), the Court stated: "Neither property rights nor contract rights are absolute; for government cannot exist if the citizen may at will use his property to the detriment of his fellows, or exercise his freedom of contract to work them harm." At 78 L.Ed. 950, the court continued "... And the

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9 (Cont'd)
these remedies in combination, is a matter within the state legislature's range of choice.

guarantee of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained."[10]

Michigan's nuisance abatement law is neither unreasonable nor arbitrary nor capricious. The "means selected", seeking to abate by sale or injunction property items used in nuisance conduct, have a real and substantial relation to the ends sought: eradication of nuisance activities.

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10 In Home Building and Loan Association v Blaisdell, 290 U.S. 398, 54 S.Ct. 231, 78 L.Ed., 413 (1934), a state statute which abrogated mortgage foreclosures was upheld, with the Court's opinion indicating the state's police power, as applied, overruled the constitutional right to contract, affirming the state's authority to safeguard vital interests of its citizens. In Lucas v South Carolina Coastal Council, supra, at 120 L.Ed.2d 817: "The government may, consistent with the Takings Clause, affect property values by regulation without incurring an obligation to compensate

The laws are necessary regulations to secure the health, safety, good order, comfort and general welfare of the community. Atlantic Coast Line R. Co. v Goldsboro, 232 U.S. 548, 34 S.Ct. 364, 58 L.Ed. 721 (1914).

Additionally, application of either a strict scrutiny analysis, or a rationally related standard would not defeat Michigan's nuisance laws. The former standard, which holds that before a state may invade the enumerated constitutional rights of an individual, it must show a compelling state interest and the ability to accomplish the interest with a narrowly drawn statute, is met by Michigan's nuisance laws: the compelling interest was the chronic need to address nuisance problems, with clearly focused language.

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10 (Cont'd)
- a reality we nowadays acknowledge explicitly with respect to the full scope of the state's police power."

The latter standard likewise can be applied to the statutes because the laws have a reasonable relationship to a proper legislative purpose, and are not discriminatory nor arbitrary. They narrowly aim to attack forms of conduct which adversely affect the overall good of society. And they are applied equally to all named "means" used in the nuisance conduct, as well as to the individuals committing the nuisance.

That an individual or group of individuals may be in some way harmed by application of a state law under its police powers is obvious. There may be a curtailing of certain real property rights,[11] or the loss of an item of property,[12] or the issuance of an

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11 Lucas v South Carolina Coastal Council, supra.

12 Van Oster v Kansas, 272 U.S. 465, 47 S.Ct. 133, 71 L.Ed. 354 (1926)

injunction issued forbidding conduct.[13] But if substantive and procedural due process[14] are complied within the application of the legislation, and no other constitutional impediments exist, a state statute furthering police powers is constitutional and must be affirmed.[15]

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13 State v Dizzy Duck, 203 Mich App 250; 511 N.W.2d 407 (1994), rev'd ___ Mich ___, slip opinion released July 25, 1995; nos 98804, 98805.

14 This Court in Ingraham v Wright, 430 U.S. 651, 97 S. Ct. 1401, 51 L.Ed.2d 711 (1977), at 51 L.Ed.2d 732 said this about due process: "... Representing a profound attitude of fairness... 'due process' is compounded of history, reason, the past course of decisions, and stout confidence in the strength of the democratic faith which we profess" (Case cited omitted)

15 The reasonableness of the law is not a question for the courts, but for the legislature. Sproles v Binford, 286 U.S. 374, 388, 52 S.Ct. 581, 76 L.Ed. 1167 (1932). However, should a legitimate question as to reasonableness arise, the Court might utilize the test set forth in Goldsboro, supra: 1) The nature of the menace against which the statute will protect, 2) The availability and effectiveness of other less drastic

Petitioner's claim to be an innocent owner is not decisive. Tina Bennis may not have known that John Bennis and a prostitute were committing fellatio in a residential area, but the record shows Mr. Bennis had been seen earlier talking with prostitutes, while in an auto (possibly the Bennis' second car - the 1978 Oldsmobile).

Additionally, it could be argued that, at the time of the trial, Tina Bennis was a co-owner of the 1977 Pontiac in name only: not the actual "owner" who exercised dominion and control over the Pontiac (especially since it appears John Bennis used that car to go to and from work). (See

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15 (Cont'd)
protective steps, and 3) The loss which the grieved party will suffer from imposition of the law. Here, the menace of nuisance conduct is put before a neutral magistrate, exercising equity discretion, and each case may result in different conclusions.

U.S. v A Single Family Residence, 803 F.2d 625, 630 (11th Cir. 1986); and Commonwealth v One 1986 Volkswagon GTI, 417 Mass. 369 (1994), the latter two matters dealing with record owner versus actual owner).

The significance of these two points detracts from the facial impact the term "innocent owner" has: even innocence is relative, and perspective is important.

Footnote 10 of Austin v U.S., 509 U.S. ___, 113 S.Ct. 2801, 125 L.Ed. 2d 488 (1993), does not require a foregone conclusion when this Court hears "innocent owner".[16] Rather, the fact that each nuisance abatement matter involving co-owners will be subject to differing remedies depending on the particular facts,

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16 In U.S. v One Ford Coupe Automobile, 272 U.S. 321, 47 S.Ct. 154, 71 L.Ed. 279, (1926), this Court

and that Michigan's nuisance abatement laws are valid, reasonable exercises of the state's police powers furnish the Court with two solid reasons to affirm the decision in the state court.

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16 Cont'd
allowed forfeiture of the interest of a company having no guilty knowledge of the use of the vehicle for an illegal purpose; in Van Oster, supra, after mentioning legislation which imposed "liability on owners of vehicles for the negligent operation by those entrusted with their use", 71 L.Ed. at 358, the Court affirmed the state law nuisance action which forfeited the car; and in Goldsmith, Jr.- Grant Co. v U.S., 254 U.S. 505, 41 S.Ct. 189, 65 L.Ed. 376 (1920), the Court upheld forfeiture, under federal law, of a vehicle wherein the seller had reserved title in it, but had no knowledge of its illicit use.

II. DUE PROCESS OF LAW AND THE TAKINGS CLAUSE OF THE FIFTH AMENDMENT ARE NOT VIOLATED BY APPLICATION OF MICHIGAN'S NUISANCE ABATEMENT LAW TO A CO-OWNER OF A VEHICLE, WHICH OWNERSHIP INCLUDES A RESPONSIBILITY TO PREVENT, OR ANSWER FOR, COMMUNITY HARM CAUSED BY THE OTHER CO-OWNER'S MISUSE OF THE VEHICLE, WHERE OTHER STATUTES INCLUDE AN AFFIRMATIVE RESPONSIBILITY TO PREVENT, OR ANSWER FOR, INDIVIDUAL HARM CAUSED BY MISUSE OF A VEHICLE OR IMPOSE STRICT LIABILITY, IRREGARDLESS OF INTENT, INNOCENCE OR EXERCISE OF CARE AND THOSE LAWS ARE CONSTITUTIONAL IN APPLICATION.

A. Michigan's statute, by its language, impliedly imposes on a vehicle owner a duty to ensure that the vehicle not be used contrary to statutory proscriptions; and knowledge of the misuse is not required.

The clear words of the statute, as applied to vehicles, state: "Any ... vehicle ... used for the purpose of lewdness, assignation or prostitution... is hereby declared a nuisance ... and nuisances shall be enjoined and abated." MCL 600.3801; MSA 27A.3801. There are no words or phrases which exempt a co-owner of a vehicle. On the contrary, an additional statute, MCL 600.3815(2); MSA 27A.3815(2) specifically explains that "Proof of knowledge or the

existence of the nuisance on the part of the defendants or any of them, is not required".

It should be clear that a legislature may enact laws which exclude the element of knowledge. In Chicago, B. and Q.R. Co. v U.S., 220 U.S. 559, 31 S.Ct. 612, 55 L.Ed. 582 (1911), this Court upheld the penalty imposed upon a carrier in interstate commerce for violation of the safety appliance acts of Congress. As to the claim that the particular statute exacted a penalty and should be governed by criminal procedure, the Court exclaimed:

> 'The contention that because the exaction which the statute authorizes the Secretary of Commerce and Labor to impose is a penalty, therefore its enforcement is necessarily governed by the rules controlling in the prosecution of criminal offenses, is clearly without merit, and is not open to discussion.' If the statute upon which the present action is based had expressly or by implication declared that the penalty prescribed may only be recovered by a criminal proceeding, that direction must have been followed. The power of the

> legislature to declare an offense, and to exclude the elements of knowledge and due diligence from any inquiry as to its commission, cannot, we think, be questioned. (Id, at 55 L.Ed. 588-589) (Emphasis added)

Different from but, as applied, very similar to the federal railroad car safety appliance act above, Michigan's nuisance abatement laws likewise "exclude the elements of knowledge". Addressing as it does the social problem of nuisance conduct, Michigan's law imposes on any proper defendant "strict liability": if his or her vehicle is used to perpetuate nuisance conduct, it may be forfeited.

There is nothing inherently unconstitutional in legislation which does away with the concept of knowledge.[17] Chicago, B.Q.R.Co, supra. Any allegation of unconstitutionality, then, could only arise from how the legislation is applied in a

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17 As Justice Harlan stated in Chicago, Burlington, and Quincy Railroad, Co., supra at 55 L.Ed.588,

particular factual context. But, as explained in the previous argument, the application here provides no foundation for a constitutional claim by petitioner. Tina Bennis received a hearing in court, and she presented her story. No denial of procedural or substantive due process existed.

As written, the Michigan law subjects all who might become nuisance abatement defendants to the possible equitable penalty of loss of the property at issue, even though the action is brought in personam.[18] Given the state legislature's ability

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17 Cont'd
recognizing the parameters of court review: "The Congress...has prescribed and defined the duty by statute. We have nothing to do but to ascertain and declare the meaning of a few simple words in which the duty is described"

18 Most courts have dropped the oft-used practice of naming the vehicle as the "offending item", but some of Michigan's nuisance abatement cases are filed with the property (a building for example) named in rem along with the

to word laws without specifying an "innocent owner" defense, and the logical consequence that those laws as applied are sustainable, petitioner's repeated claim that MCL 600.3815(2); MSA 27A.3815(2) is unconstitutional fails.

1. Precedent exists in state and federal courts as to laws which impose strict liability upon an "innocent" offender; thus, reason exists for affirmance of Michigan's nuisance abatement act with its "no need to show knowledge" phrasing.

A Mr. Morisette, admitting at trial he believed the shell casings he had taken (and sold) from a government bombing range were abandoned, was convicted under federal law for "knowingly converting government property." This court, in Morissette v U.S., 342 U.S. 246, 72 S.Ct. 240, 96 L.Ed. 288 (1951), reversed, explaining that an

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18 Cont'd
other appropriate defendants named in personam. Naming the persons as defendants eases the court's ability to enjoin all or some of them from the nuisance conduct as facts dictate.

"essential prerequisite" of criminal liability was criminal intent, correcting the trial court's refusal to instruct that defendant may have acted without wrongful or criminal intent.

Footnote 13, in Morissette, at 96 L.Ed. 296, reads:

> The development of strict criminal liability regardless of intent has been roughly paralleled by an evolution of a strict civil liability for consequences regardless of fault in certain relationships, as shown by Workmen's Compensation Acts, and vicarious liability for fault of others as evidenced by various Motor Vehicle Acts. (Emphasis added).

Those laws referred to in the footnote were the "...increasingly numerous and detailed regulations which heighten the duties of those in activities that affect public health, safety or welfare," addressing "public welfare offenses". Id, at 96 L.Ed. 296.

Michigan's nuisance abatement laws are legislation addressing "public welfare offenses": the nuisance conduct addressed in the law is offensive to the public morals, welfare, safety, and health. The strict liability set forth in the civil application of the statute does not address nor provide for a claim of exercise of care or innocence as to the facts. Any "defense" may be presented at the trial, but innocence does not excuse the conduct or potential abatement of property used.

The Morisette opinion explained: "such offenses ... may be regarded as offenses against (the state's) authority, for their occurrence impairs the efficiency of controls deemed essential ... to the social order...". (Id. at 96 L.Ed.296)

Vehicles that are used in furtherance of prostitution nuisance conduct "impair" the government control laws are meant to

have on an ordered society. The criminal offense committed, with the possibility of loss of freedom for the offender, and the use of a vehicle to commit the act, require that all rational steps available to a government be applied to reasonably combat the problem affecting the social order.

To do so is to give effect to those regulatory measures exercised by a governmental entity within the police power where "the emphasis of the statute is evidently upon achievement of some social betterment rather than the punishment of crimes." (Justice Taft in U.S. v Balint, 258 U.S. 251, 252, 42 S.Ct 301, 66 L.Ed. 605 (1922), cited in Morissette, supra, at 96 L.Ed. 298)

The federal law addressed in Chicago, B. and Q. R. Co., supra, imposed strict liability on those affected: there was an absolute duty to comply. Even though the

defendant had exercised reasonable care, the Court upheld the lower judgment, exclaiming that a civil duty had a civil consequence. Id, 55 L.Ed. 586.

As to the claim the law imposed a "harsh construction", Justice Harlan wrote in Chicago B. & Q.:

> To this we reply that, if it be the true construction, its harshness is no concern to the courts. They have no responsibility for the justice or wisdom of legislation, and no duty except to enforce the law as it is written, unless it is clearly beyond the constitutional power of the law making body, (Emphasis in original) (Id, 55 L.Ed. 588)

An 1884 Michigan case People v Roby, 52 Mich 577, 18 N.W. 365 (1884), illustrates the co-existence of strict liability and lack of knowledge. A state law provided that all saloons had to be closed on Sundays. Any person who violated the requirement was guilty of a misdemeanor.

The respondent Roby was prosecuted under the law after a clerk opened the saloon (located in Roby's hotel) on Sunday and sold a drink to another. Roby was not present, although he was on the hotel premises. There was no evidence Roby agreed to or knew of the saloon being open that day. Yet he was convicted for not keeping his bar closed.

Discussing the matter, Justice Cooley, writing the Michigan Supreme Court's opinion, said the following:

> It is contended... that to constitute an offense... there must be some evidence tending to show an intent on the part of the respondent to violate it. ...The section under which Roby is prosecuted makes the crime consist, not in the affirmative act of any person, but in the negative conduct of failing to keep the saloon, etc., closed.
>
> ... Many statutes which are in the nature of police regulations, as this is, impose criminal penalties irrespective of any intent to violate them; the purpose being to require a degree of diligence for

the protection of the public which shall render violation impossible. (Id., at 579)

Roby's lack of knowledge of the incident, the defendant's exercise of due care in Chicago, B. and Q., supra, and petitioner's cry of "innocent owner" here sound much the same: each is a claimed defense to the strict liability set forth in the particular law at issue. In civil matters legislative enactments with no "innocent owner" defense or proclaiming that lack of knowledge is no defense are valid unless applied improperly.[19] Such was not the case here.

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19 Compare, however, state statutes from Tennessee: Tenn. Stat. 40-33-210, Criminal Procedure, Forfeitures, which requires the state to prove the co-owner was either a co-conspirator, or knew the property was illegal, or knew it was being used illegally before forfeiture can be ordered; Florida: Fl.St. 932.703, concerning the state Contraband Forfeiture Act, which allows an "innocent owner" to establish the innocent owner defense, and which recognizes the interest of that person

B. The parallel between Michigan's civil liability law, which subjects an innocent co-owner of a vehicle to extreme liability where the vehicle was misused by the other co-owner and caused individual harm, and this nuisance abatement law, which may subject the innocent co-owner of a vehicle to possible forfeiture of that person's interest, when the vehicle was used in nuisance conduct by the other co-owner and caused community harm, requires a reviewing court to affirm the lower court.

In Michigan, as in other states, the owner of a motor vehicle shall be liable for any injury caused by improper use of the vehicle, no matter who drives the car, if

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19 Cont'd
by requiring payment for their share; and Colorado: C.R.S. 16-13-301 et seq., Abatement of Public Nuisance, in 16-13-303 setting forth the Pearson language for an "innocent owner" defense. Note that California's Public Nuisance Law, Cal. Vehicle Code 22659.5, requires a conviction before a nuisance vehicle may be declared a nuisance; then allowing a 48 hour impoundment if the offender violates the injunction as to the car.

the owner consented or knew the other person who was driving. After an injury has been caused with the owner's vehicle, it is no defense to liability for the owner to claim innocence.[20]

Three Michigan cases are illustrative. Hawkins v Ermatinger, 211 Mich 578, 179 N.W. 249 (1920), presented facts showing the defendant's auto driven by his son and causing injury. The defendant interposed that he had given orders to the garage where the car was kept not to allow the son to use the vehicle. Also, the defendant said he had told his son not to drive the car. Lastly, the defendant said the vehicle was taken without his knowledge and consent.

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20 Other examples of strict liability statutes can be found discussed in: East River S.S. Corp. v Transamerica Delaval, Inc., 476 U.S. 858, 106 S.Ct. 2295, 90 L.Ed.2d 865, (1986); and Todd v Societe Bic, S.A., 21 F.3d 1402 (7th Cir. 1994).

The applicable statute had a clause exempting the owner from liability where the car was driven without his express or implied consent or knowledge. The court phrased the question as to the ability of the legislature, in the exercise of the police power, to impose liability on the owner for damage caused by negligent operation of the vehicle by a family member who was using it without permission and contrary to orders. (Id., at 582)

After reviewing several cases, the court opined that the meritorious question presented was: "Is this provision in question a reasonable regulation?" (Id, at 584) The Court then stated that the duty to determine reasonableness rested on the legislature and "this court should only interfere when constitutional rights are invaded". (Id, at 585)

Prior to affirming the validity of the law as applied, the Michigan court quoted Commonwealth v Alger, 7 Cush. (Mass), 53:

> It is a well-settled principle, growing out of the nature of well-ordered civil society, that every holder of property, ... holds it under the implied liability that his use of it may be so regulated that is shall not be injurious to the equal employment of others having an equal right to the employment of their property, nor injurious to the rights of the community. (Hawkins, at 586)

Saying the act involved the public policy of the state, and its "regulation of the use of such vehicles" (Id, at 588), the court said the law was within the power of the legislature to enact, and that the legislature may have "considered the impossibility of the plaintiff meeting such a defense and the necessity of providing against it". (Id)

Stapleton v Independent Brewing Co., 198 Mich 170, 164 N.W. 520 (1917),

(reviewing application of the same law as in Hawkins, supra), held the owner liable for injury caused by his vehicle, driven by an employee of the company to which the owner had lent it. Concluding that the statute was within the police power of Michigan, the court repeated that an automobile owner is supposed to know about those to whom the vehicle is entrusted.

A 1913 case, Daugherty v Thomas, 174 Mich 371, 140 N.W. 615 (1913), examined the predecessor to the statute at issue in Stapleton and Hawkins, supra. Although concluding that one segment was unconstitutional and must be excised, the court's dicta contained relevant discussion.

They said an "owner of property is one who has dominion over it", (Id, at 375), and that the police powers of a state allow

broad latitude as regards property.[21] Finding subdivision 3 of a section of the law "not a necessary regulation in the exercise of the police power", the court struck it, but upheld the remainder of the law.

The thread running through those three cases of strict liability on an owner finds a modern counterpart in the nuisance statute here: lack of knowledge is no defense.

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21 The Daugherty opinion made pointed reference to extensive quotes from Volume 1 of Tiedeman on State and Federal Control of Persons and Property and from Justice Marshall in a Wisconsin case. Pertinent is a portion of the quote from Justice Marshall:
(The) police power extends to and permits legislation regulating reasonable matters appertaining to the public welfare, since everything beyond that must necessarily fall at the threshold of some constitutional defense". Petitioner claims her innocent owner" defense is that "constitutional defense" and is required; respondent argues that a police power allows the result here.

Young v Masci, 289 U.S. 253, 53 S. Ct. 599, 77 L.Ed. 1158 (1932), also dealt with a similar state auto liability law. The New York legislation made the auto owner liable for the negligent use of the vehicle by any person using it with permission. Denying owner Young's claim,[22] this Court stated in part, that the "statute makes mere permission to use the car the basis of liability in case of negligent injury". (Id., at 77 L.Ed. 1162)

Mere permission by petitioner, Tina Bennis, to John Bennis to use the 1977 Pontiac, the family's second car, to go back and forth to work subjected Tina Bennis to the strict liability of Michigan's nuisance

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22 Young only challenged N.Y. law as it applied to a nonresident owner who made the bailment outside New York and who was not in the state at the time of the accident. (Young v Masci, supra, at 77 L.Ed. 1160).

law when her husband consorted with a prostitute in a residential area. His community harm subjected petitioner to the possible loss of her interest in the car, in spite of her innocence.

It would be highly ironic, and constitutionally inexplicable, to hold that if John Bennis on the night in question had driven the car into the prostitute and caused her physical injury, Tina's interest in the car and all her other assets would be liable to a civil judgment of unlimited amount in favor of the prostitute because of Tina's ownership responsibility, but to protect the residents of the Detroit neighborhood where this vice-market was operating, a sanction of $300 against Tina for breach of the same ownership responsibility is unconstitutional.

The appellants in Hawkins, Stapleton, Daugherty and Young were involved in

situations concerning individual harm; the Bennis' car was involved in damage to the community: adding to the prostitution problem and encouraging its continuance. Michigan's police power regulation, MCL 600.3801; MSA 27A.3801, expressly indicates that public good outweighs an individual's isolated claim and may result in forfeiture of the individual's interest. The statute and its application are valid and meet constitutional tests. The trial court's decision should be affirmed.

CONCLUSION

Because of the above-stated reasons, the judgment of the Michigan Supreme Court as to petitioner Tina Bennis should be affirmed.

Respectfully submitted,

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In The

Supreme Court of the United States

October Term, 1995

TINA B. BENNIS,

Petitioner,

v.

STATE OF MICHIGAN ex rel.
WAYNE COUNTY PROSECUTOR,

Respondent.

On Writ Of Certiorari To The
Supreme Court Of Michigan

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INTRODUCTION

The briefs filed by the State of Michigan and the United States, as one of its supporting *amici*, take contrasting positions regarding the existence of any constitutional limits to forfeiture of the property of blameless persons. The State of Michigan, arguing by analogy to statutes establishing "vicarious liability" in civil tort actions, contends that truly innocent owners are entitled to no protection whatsoever by the Constitution. The analogy to civil "vicarious liability" statutes is fundamentally flawed and cannot support the State's position.

The United States, on the other hand, acknowledges that blameless persons are protected from forfeiture under the Due Process and Takings Clauses,[1] but disagrees with Tina Bennis regarding the standard for determining innocence or culpability, the allocation of the burden of proof on that issue, and the application of the appropriate standard to the facts of this case. The United States believes that an owner's culpability should be determined under the "all reasonable steps" standard, rather than the negligent entrustment standard advocated by petitioner and suggested by the Court's historical analysis in *Austin v. United States*, 113 S. Ct. 2801 (1993). The United States argues that the owner must bear the burden of proving lack of culpability, and contends that Tina Bennis did not sustain that burden here under either standard.

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[1] The United States, while emphasizing the due process underpinnings for the constitutional protection for truly innocent owners, suggests that analysis under the Takings Clause "does not appear to add anything to the constitutional analysis in this context," thereby implying that the constitutional rule can be derived from that Clause as well. (U.S. Br. 15 n.6).

Because the evidence below establishes unquestionably that Tina Bennis neither knew nor should have known of the illegal use, she would prevail under either the "all reasonable steps" or the negligent entrustment standard. However, she urges this Court to reject the "all reasonable steps" standard advocated by the United States in favor of the negligent entrustment standard as the basis for determining the constitutionally required culpability in civil forfeiture proceedings. Because of its vagueness, the "all reasonable steps" culpability standard has led to widely divergent innocent owner determinations in federal and state cases, and to arbitrary forfeitures of property. Indeed, the position taken by the United States with respect to Tina Bennis betrays the fundamental deficiencies of the standard. Negligent entrustment as a standard of culpability is clearer and more realistic than "all reasonable steps" and is far less susceptible to being applied in a way that subjects blameless property owners to forfeiture.

The United States' contention that Tina Bennis should not prevail depends entirely on its position that she had the burden of proof with respect to culpability, thereby demonstrating the inextricable interdependency between a substantive standard of culpability and the allocation of the burden with respect to that standard. Therefore, the Court is asked to reach the burden issue and rule that, under both the Due Process Clause and the Takings Clause, the State bears the burden of proving the constitutionally required culpability in civil forfeiture proceedings.

ARGUMENT

A. The Arguments Against The Recognition Of Constitutional Protection For Truly Innocent Owners Made By The State Of Michigan And *Amicus Curiae* American Alliance Are Without Merit

The State of Michigan's brief ignores both the recognition in the *Calero-Toledo* dicta that the Constitution protects blameless individuals from forfeiture of their property, and the conclusion in *Austin* that forfeiture has traditionally been understood as punishment for personal culpability in negligently entrusting property. In arguing against recognition of a constitutional protection for wholly innocent persons, the State focuses primarily on state statutes that, in derogation of common law, create vicarious liability for automobile owners in personal injury actions. (Respondent's Brief at 45-52). The State appears to argue that, because the constitutionality of such statutes has been taken for granted, it follows that the Constitution affords blameless owners no protection from forfeiture. That argument is without merit.[2]

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[2] The State of Michigan also analogizes by reference to so-called "public welfare" criminal statutes (Mich. Br. 39-41), a class of statutory offenses defined earlier in this century that "[did] not fit neatly into any of . . . [the] accepted classifications of common law offenses, such as those against the state, the person, property, or public morals." *Morissette v. United States*, 342 U.S. 246, 255 (1952). A defendant charged with the commission of such a crime can be found liable even if he lacks *mens rea* – that is, is unaware of "the facts that make his conduct" satisfy an element of the offense. *Staples v. United States*, 114 S. Ct. 1793, 1798 n.3 (1994). But this Court's implicit acknowledgement of the constitutionality of particular public welfare offenses is in no respect inconsistent with a constitutional prohibition against forfeiting the property of blameless persons like Tina Bennis here. For unlike public welfare offenses, the criminal law

The class of statutes to which respondent refers make automobile owners vicariously liable to private plaintiffs in tort actions for injuries caused by persons who were driving the automobile with the owner's consent. Because of the very significant difference in purpose between forfeiture statutes and statutes that facilitate recovery of damages in private litigation, this analogy is inapposite. The automobile owner liability statutes do not authorize the imposition of punishment, as do the forfeiture provisions of the nuisance abatement act, but instead shift the incidence of a personal injury plaintiff's loss to assist him in recovering for that loss. Since the purpose of these statutes is not "punitive," as are forfeiture statutes, due process questions are not raised. And because the State does not stand to benefit in a pecuniary sense from the operation of these automobile owner liability statutes, the statutes raise no takings issues. *Cf. United States v. James Daniel Good Real Property*, 114 S. Ct. 492, 502 (1993) ("[I]t makes sense to scrutinize governmental action more closely when the State stands to benefit") (citation and internal quotation marks omitted).

Nor has respondent cited to any common law precedent for imposing punitive vicarious liability on one

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offenses such as prostitution that trigger forfeiture under the Michigan statute belong to a long-established common law tradition of offenses against "the state, the person, property, or public morals." Furthermore, public welfare statutes have been construed to impose only a *limited form of strict liability*, *Staples*, 114 S. Ct. at 1798 n.3, on a person who commits an act or omission constituting a criminal offense. As construed by the Michigan Supreme Court, the forfeiture provisions of the Michigan statute, by contrast, punish one person vicariously for the criminal acts of another – or, as in this case, for the criminal acts of a number of persons who collectively created the "nuisance condition" – in the absence of any knowledge on the part of the innocent owner that those acts will take place.

spouse for the acts of another spouse. Consistent with the position of the United States, petitioner is aware of "no common law tradition that would support the imposition of punitive liability on a spouse based solely on the actions of a partner." (U.S. Br. 21).[3]

The *amicus* brief of the American Alliance for Rights and Responsibilities ("American Alliance") does not address petitioner's argument for recognition of a due process-based protection for innocent owners. It does, however, argue against recognition of such protection under the Takings Clause by making the unsupported assertion that "[c]ivil forfeiture has long been a background principle[ ] of the State's law of property and nuisance already place[d] upon . . . ownership." (A.A.R.R. Br. 17) (internal quotation marks omitted) (citing to *Lucas v. South Carolina Coastal Council*, 112 S.Ct. 2886, 2900 (1992)). To the extent *amicus curiae* is suggesting that forfeiture of a truly innocent person's property in this factual context has been a "background principle" of the law of "property and nuisance," the statement is incorrect. First, it ignores the historical analysis in *Austin* that civil forfeiture has consistently been understood as

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[3] The constitutionality of vicarious criminal liability has never been directly addressed by this Court in any context. Contrary to the United States' suggestion, the Court in *United States v. Park*, 421 U.S. 658 (1975) did not "uph[o]ld strict, vicarious criminal liability for a corporate officer based on his company's conduct . . . " (U.S. Br. 14-15) . Instead, the Court in *Park* made clear that the liability of a corporate officer for wrongful acts of a corporation was based on "an omission or failure to act" by that officer who "had the power to prevent the act complained of." 421 U.S. at 671. Because the criminal liability in *Park* was based on the officer's own, rather than an imputed, "omission or failure to act," and because it depended in part on whether the officer could have prevented the harm, the criminal liability was not "vicarious" in nature.

punishment for personal culpability. *Austin*, 113 S. Ct. at 2808-10. Second, it disregards the limits to nuisance abatement – both as to liability and remedy – that existed (and still exist) at common law that would have precluded forfeiture of Mr. Bennis's interest in the family automobile, let alone his innocent wife's interest. (Pet. Br. 34-36 & n.20; *see also* Inst. Just. Br. 23, 24-25). Finally, it overlooks the traditional limitations regarding equitable remedies in nuisance cases involving owners who had no actual or constructive knowledge of the misuse of their property by another.[4]

B. The "All Reasonable Steps" Standard For Determining Culpability Is Constitutionally Unsound

Although Tina Bennis contends that she should prevail under the "all reasonable steps" standard for determining culpability in the context of civil forfeiture (Pet. Br. 27-28), she urges this Court to adopt the negligent entrustment standard suggested by the Court's historical analysis in *Austin* to ensure that property rights are protected from arbitrary deprivation by the State. The United States acknowledges what the *Austin* Court made clear

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[4] At common law, where a property owner had no knowledge of a misuse of his property, courts refrained from issuing injunctive relief against that owner. Thus, in *People ex rel. Dougherty v. Holschuh*, 209 N.W. 158, 160 (Mich. 1926), the Michigan Supreme Court stated that the traditional equitable power of a court (as distinct from powers purportedly granted by the Michigan nuisance abatement statute) to enjoin a landlord from use of his property, was limited to situations "in which *the owner knew, or within reason should have known, of [the] unlawful use.*" (emphasis added). The Michigan Supreme Court in *Holschuh* accordingly upheld the lower court's refusal to issue an injunction closing a landlord's building for one year, even though that remedy was sought by the prosecutor and was mandated by a provision of the Michigan nuisance abatement statute. *Id.*

(Pet. Br. 16 & n.8), which is that the "all reasonable steps" standard is intended to embody a "reasonable care" or negligence concept. (U.S. Br. 26). Yet because of the standard's vagueness – and because it does not require courts to take account of the relationship between actual or constructive knowledge of misuse and a duty to take preventive measures – courts have too often applied that standard so as to permit a forfeiture in the absence of fault. (Pet. Br. 25-26 & n.15).

The United States' brief not only fails to address the potential for arbitrary applications of the "all reasonable steps" standard, but actually adopts a position with respect to Tina Bennis that illustrates the standard's defects. The circumstances of this case establish that Tina Bennis is blameless in connection with her husband's illegal use of the Bennis automobile. The State conceded that she had no *knowledge* of the illegal use, and her testimony likewise demonstrated that she had no *reason to know* of the illegal use. (Pet. Br. 26-27). Yet the United States contends that Tina Bennis's property should be forfeited because she did not prove at trial that she took "all reasonable steps" to prevent her husband from having illicit sex in the car.[5] (U.S. Br. 25-26). But what

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[5] The United States also argues that Tina Bennis's constitutional claim should fail because she did not properly plead it. (U.S. Br. 25-26). That argument hardly merits consideration by this Court. In a motion for summary judgment filed prior to submission of her answer, Tina Bennis alleged, *inter alia*, that "the seizure of the vehicle constituted a violation of . . . the U.S. . . . Constitution[ ], in that . . . the seizure constituted . . . an improper deprivation of property without due process of law; and an improper taking of property without just compensation." (Mot. Sum. Judg. 4). She pled as an affirmative defense that the State of Michigan had failed to allege "that Defendant Tina Bennis had any knowledge of the alleged nuisance . . . ." (Answer 3). Under ordinary notice pleading rules, that

reasonable measures should she have undertaken given her lack of knowledge or reason to know of the misuse that occurred? Without suggesting even a single "reasonable step" that Tina Bennis failed to take to ensure her husband's marital fidelity, the United States argues that forfeiture is appropriate under that standard.

The United States also appears to argue that Tina Bennis should lose her property because she is no more "innocent" than the yacht leasing company in *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974). Thus, the United States, noting that marijuana was discovered on the boat more than a year after the lessee took possession, states that "there is no suggestion [in *Calero-Toledo*] that the yacht owner acted negligently in entrusting the yacht to the lessees." (U.S. Br. 26). The United States also acknowledges that, following transfer of possession of the yacht to the lessees, the company "presumably had limited means, as a practical matter, of preventing the illegal use of its yacht." (U.S. Br. 28). But as petitioner argued in her principal brief, the Court in *Calero-Toledo* declined on procedural grounds to decide whether the yacht leasing company did or did not satisfy the "all reasonable steps" standard, and *Calero-Toledo* therefore offers no guidance on how the standard is to be applied. (Pet. Br. 24 n.14). For that reason, any suggestion that, because the yacht leasing company failed to satisfy the "all reasonable steps" standard, Tina Bennis must also lose under that standard rests on a faulty

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affirmative defense embraced both "actual" and "constructive" knowledge. In addition, she introduced, without objection, evidence regarding the absence of both "actual" and "constructive" knowledge of her husband's misuse of the car.

premise. In addition, the United States' suggestion that the yacht leasing company should have forfeited its property under the "all reasonable steps standard" again reveals the deficiencies of that standard as a means for measuring culpability. If, as the United States assumes, there was no negligence by the company in leasing the yacht to the individuals who subsequently brought marijuana on board, and if the company had only "limited means, as a practical matter," of preventing that occurrence after the lessees took possession, then what possible fault can be ascribed to the yacht company?

As the United States would apply the "all reasonable steps" test to Tina Bennis and to the yacht company in *Calero-Toledo*, the standard does not measure an owner's negligence, but instead makes the owner a guarantor for the behavior of the person who misuses the property. Because its vagueness invites such applications, the "all reasonable steps" standard should not be made the basis of any constitutional rule protecting the rights of innocent owners.

C. The Negligent Entrustment Standard Proposed By Petitioner Better Accommodates The Need To Protect Property Rights From Arbitrary Deprivation By The Government

Petitioner argues that the common law negligent entrustment doctrine, which is codified in § 308 of the Restatement (2d) of the Law of Torts, offers a fairer, clearer, and more realistic standard than "all reasonable steps" for determining the degree of culpability that is constitutionally required before the "punishment" of forfeiture may be imposed. (Pet. Br. 25-26). Fault under the negligent entrustment standard is ascertained according to whether a person had actual or constructive knowledge that his property was likely to be misused and

according to whether he exercised meaningful "control" over that property. As compared to the "all reasonable steps" standard, this rule for determining culpability would better serve two values that are vital to our legal and constitutional tradition: 1) the historic importance of property rights and the need to secure them from arbitrary deprivation (or deprivation without compensation) by the State; and 2) the fundamental principle that the State should not impose punitive sanctions on a citizen in the absence of personal culpability (in the form of a blameworthy act or omission). Moreover, the negligent entrustment test would serve one of the principal justifications offered by the United States for forfeiting property of owners who have no direct complicity in the illegal use of their property – namely, ensuring that owners do not collude with others in the misuse of their property. (U.S. Br. 13).[6]

Although both of the *amicus* briefs filed in support of the State of Michigan acknowledge the interdependency

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[6] The statutory protection for innocent owners in the federal drug forfeiture statute, 21 U.S.C. § 881, is at least as broad as a constitutional protection based on lack of actual and constructive knowledge would be. The innocent owner defense in § 881(a) provides that property shall not be forfeited for acts or omissions established by the owner to have been committed or omitted "without the knowledge or consent of the owner," 21 U.S.C. § 881(a)(6) and § 881(a)(7), or "without the knowledge, consent, or wilful blindness of the owner," 21 U.S.C. § 881(a)(4)(C). The statutory protection would be broader in two respects. First, under the most common definitions of wilful blindness, *see, e.g., United States v. One 1973 Rolls Royce*, 43 F.3d 794, 807-08 (3d Cir. 1994), lack of wilful blindness is more easily demonstrated than lack of constructive knowledge. Second, under the prevailing interpretation of the statutory defense, an owner *with* knowledge can still qualify for the defense, so long as she can prove lack of consent. *Id.* at 812, 816-17.

between knowledge of an illegal use and the existence of a duty to take all reasonable measures to prevent it,[7] both briefs oppose the use of the negligent entrustment standard. The United States argues that under the *Calero-Toledo* dicta, "lack of knowledge, *or reason to know*, of the illegal conduct that caused the forfeiture, and lack of participation in that conduct" are not sufficient to protect an owner from forfeiture. (U.S. Br. 13) (emphasis added). Thus, it opposes a standard which, *inter alia*, makes the absence of "constructive knowledge" determinative. But, contrary to the United States' paraphrasing of the *Calero-Toledo* dicta, the dicta is actually silent on the effect of a lack of constructive knowledge. And inasmuch as the *Calero-Toledo* standard is, at bottom, a negligence standard (Pet. Br. 16), the use of the constructive knowledge element is entirely consistent with the standard.

The United States also argues that the negligent entrustment standard departs from the *Calero-Toledo* dicta by focusing solely on whether reasonable care was exercised at the time of entrustment, and failing to consider the exercise of reasonable care after entrustment. (U.S. Br. 26-27). In fact, the policy justifications offered by the Court in *Calero-Toledo* for forfeiting the property of persons who have no direct complicity in its misuse indicate that events prior to transfer are those which should be examined to determine whether "reasonable care" has

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[7] The United States concedes that "[i]t may be true in many cases that a spouse who lacks reason to know that the other spouse will use jointly owned property illegally cannot reasonably be expected to take any precautions." (U.S. Br. 29). And the amicus brief of the American Alliance acknowledges that "an uninvolved co-owner would have to know of the specific illegal use in order to take reasonable steps to prevent it." (A.A.R.R. Br. 19).

been exercised. The purpose of forfeiture in those circumstances, the Court said, is to "induc[e] [owners] to exercise greater care in transferring possession of their property." 416 U.S. at 688. Determining whether there has been negligence at that time merely recognizes that in most cases after property is entrusted, the owner has "limited means, as a practical matter, of preventing the illegal use [of her property]. . . . " (U.S. Br. 28).

The United States nevertheless suggests that, even where a property owner (such as a lessor of boats or airplanes) "lacks reason to know" of, say, illegal drug activity, the law may require the lessor to "monitor the activities" of lessees to determine whether they are using his property to facilitate unlawful acts. (U.S. Br. 29). But the imposition by government of "affirmative law enforcement obligations on private parties" runs counter to our Anglo-American legal tradition. (Inst. Just. Br. 17). Thus, the crime of misprision of a felony – the offense of failing to report a felony that one acquires knowledge of – has no "meaningful existence" in this country, and there is doubt that it ever became part of the American common law. W. Lafave and A. Scott, *Criminal Law* 600 (1986); *see also Marbury v. Brooks*, 20 U.S. (7 Wheat.) 556, 575-76 (1822) (stating that a law which would punish a person for failing to "accuse every offender, and to proclaim every offense which comes to his knowledge" is "too harsh for man").[8] Moreover, detection of crime by

[8] Some courts use the "all reasonable steps" test to determine whether an owner *with* knowledge of an illegal use may still qualify for the "innocent owner" defense (*see* note 6, *supra*) in the federal drug forfeiture statute. *See, e.g., United States v. 141st Street Corp.*, 911 F.2d 870, 879 (2d Cir. 1990) (defining "consent" to mean "the failure to take all reasonable steps to prevent illicit use of [property] once one acquires knowledge of that use"), *cert. denied*, 498 U.S. 1109 (1991). One court has endorsed the view that persons who acquire such knowledge should not be required to "take heroic personal risks" to avoid forfeiture of their property. *United States v. 171-02 Liberty Ave.*, 710 F. Supp. 46, 51 (E.D. N.Y. 1989). Others have imposed significant duties to take affirmative steps on such owners. *See, e.g., United States v. Sixty Acres in Etowah County*, 930 F.2d 857 (11th Cir. 1991) (reversing district court and ordering forfeiture of wife's house based on finding that wife "consented" to illegal drug sales by husband, despite district court's finding that wife was "physically and mentally incapable of stopping [husband's] illegal drug activities or of reporting him to the authorities" because, *inter alia*, husband had threatened to kill wife and had murdered his previous wife by beating her to death), *rehearing, en banc, denied*, 952 F.2d 413 (11th Cir. 1991).

"monitor[ing] the activities" of others is not only difficult (*See* Amer. Bank. Ass. Br. 6-7), but also can expose a property owner to personal danger or to liability (e.g., for invasion of privacy). (Inst. Just. Br. 17; Amer. Bank. Ass. Br. 7-8).

Focusing on the time the property is entrusted would also alleviate the concern of the other *amicus curiae* that, because the "control" or "consent"[9] requirement of Restatement § 308 would not be satisfied in many spousal co-ownership situations, the negligent entrustment rule would on that basis alone "effectively preclude many states from subjecting much co-owned property to forfeiture." (A.A.R.R. Br. 20). Specifically, the American Alliance contends that the "control" requirement would frequently not be met because one spouse normally does not need to obtain the other spouse's consent before using jointly owned property. But that is only the case if

[9] The comment to section 308 indicates that property is under a person's "control" if a third person is entitled to use the property only by her consent, and she "has reason to believe that by withholding consent" she can prevent the third person from using the property. Restatement (2d) of the Law of Torts, § 308, comment a (1965).

"control" is ascertained at some time after the creation of the joint property interest. If the "control" requirement is determined as of the time the joint property interest is created, the "control" element would presumably be satisfied in most cases.[10]

D. The Burden Of Proof As To Owner Culpability Should Remain With The State

The ground advanced by the United States for affirmance of the Michigan Supreme Court opinion upholding the constitutionality of the forfeiture of Tina Bennis's property is completely dependent on the assumption that she had the burden of proving lack of culpability. The United States acknowledges that "it may be true in many

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[10] In addition to arguing against the negligent entrustment standard, the United States argues that forfeitures can be effected in the absence of fault if the relationship between the owner and the person who misused the property is one for which common law vicarious tort liability would traditionally lie. (U.S. Br. 20). In that event, the United States argues, the acts and mental state of the wrongdoer can be imputed to an owner regardless of fault. (*Id.*). In support, the United States cites to *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1, 14-15 (1991), in which the Court rejected, *inter alia*, a substantive due process challenge to the assessment of punitive damages against a corporation for the fraud of employees acting within the scope of their employment. Because *Pacific Mutual* involved vicarious liability in the context of litigation between private parties – and not a civil action brought by the State to confiscate property – reliance on that case to justify forfeitures based on traditional vicarious tort liability is misplaced. Courts have frequently been reluctant to justify forfeitures where the owner of the property and the person misusing it have a relationship for which vicarious tort liability would ordinarily be applicable. *See United States v. One Parcel of Real Estate*, 852 F. Supp. 1013, 1039-40 (S.D. Fla. 1994) (discussing cases), *amended*, 864 F. Supp. 1267 (S.D. Fla. 1994).

cases that a spouse who lacks reason to know that the other spouse will use jointly owned property illegally cannot reasonably be expected to take any precautions." (U.S. Br. 29). But the United States makes the conclusory assertion that the forfeiture in this case should be upheld because Tina Bennis failed to prove either 1) "that she lacked reason to know that her husband would use their car illegally," or 2) "that she took all reasonable steps to prevent such use." (U.S. Br. 25-26).

1. Even If Tina Bennis Had The Burden Of Proving Lack Of Culpability, She Met That Burden Here

Even assuming *arguendo* that Tina Bennis had the burden of proving lack of culpability, her unrebutted testimony at trial established both of the above propositions. Tina Bennis testified that she had no knowledge of her husband soliciting prostitutes. (J.A. 9). Respondent credited this testimony by conceding that "the lower court transcript did not show knowledge on the part of Mrs. Bennis. . . ." (Pet. Br. 26) (quoting from respondent's brief in the Michigan Supreme Court). Besides demonstrating Tina Bennis's lack of actual knowledge of the specific misuse for which Mr. Bennis was charged, this testimony – and her testimony that, on the day he was arrested, she believed he was going to come home directly from work, and that he had never failed to come home from work before – establish that Tina Bennis had no reason to know of the illegal use. (J.A. 9, 11-12). Her lack of actual and constructive knowledge therefore establishes that there were no "reasonable steps" she could have taken to prevent the illegal use, which is consistent with the failure of the State and either of the *amici* to suggest even a single "reasonable step" that she failed to take. Because there were no such steps in the

circumstances of this case, Tina Bennis necessarily satisfied her burden on this issue, if indeed it was her burden.

The United States' sole basis for contending that Tina Bennis failed to establish lack of constructive knowledge is a "security guard's testimony that he had seen Mr. Bennis soliciting prostitutes in the neighborhood of the arrest on two prior occasions." (U.S. Br. 25 n.15). Even if this is what the security guard had testified to,[11] the State has already credited Tina Bennis' denial that she had any knowledge of her husband soliciting prostitutes, which would negate any knowledge of such events. Since activity of this kind is something a husband would want to keep secret, her lack of knowledge is completely understandable.

The United States then argues that, even assuming Tina Bennis lacked actual or constructive knowledge, there still existed "reasonable steps" she could have taken to prevent the illegal use. (U.S. Br. 29). Avoiding any discussion of reasonable steps that might have been taken in *this* factual context, the United States then discusses lessor-lessee contexts in which the lessor's reasonable step would consist of "monitoring the activities" of his lessee. (U.S. Br. 29). But the United States does not suggest by what means Tina Bennis should have monitored her husband's activities and why it would be reasonable to require a wife to do so in these circumstances.

Although petitioner would prevail even if she had the burden of proving lack of culpability under either standard, she does ask the Court to reach the burden allocation issue in connection with her facial challenge to

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[11] The testimony was far more equivocal than the United States characterizes it. The security guard acknowledged on cross-examination that he had never seen Mr. Bennis "engaged in an act of solicitation." (Tr. 150).

the statute because it is inextricably related to the issue of the substantive standard for culpability necessary to justify a forfeiture. (*See* Pet. Br. 37). The fact that, in the view of the United States, the allocation of the burden is determinative of the outcome of this case demonstrates just how inseparable the issues of the substantive standard for culpability and the appropriate allocation of the burden of proof truly are.[12]

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[12] The United States argues in a footnote that "[p]etitioner did not argue in the courts below or in her petition for a writ of certiorari that the State bore the burden of proof on the innocent owner issue." (U.S. Br. 22, n.12). That statement is erroneous. In her petition for certiorari, petitioner argued that the burden of proof should remain with the prosecutor, despite the fact that the *Calero-Toledo* dicta had assigned the burden to the owner. (Pet. Cert. 17, n.15) And in the proceedings below, petitioner took the position that the State had the burden of proving both that she had "knowledge" and that she "allowed" the vehicle to be used improperly. Thus, petitioner stated in her answer to the complaint that the State "ha[d] failed to plead any facts or allegations that Defendant Tina Bennis had any knowledge of the alleged nuisance. . . . " (Answer 3). In her motion for summary disposition, she argued that "Plaintiff has failed to state a claim on which relief can be granted" because, *inter alia*, "no allegations have been made that either of the Defendants has *allowed* the vehicle to repeatedly be used for illegal purposes. . . . " (Mot. Sum. Judg. 3-4) (emphasis added). But even if the burden allocation issue had not been raised, the United States has itself raised the issue by arguing in its *amicus* brief that petitioner failed to satisfy her burden. The argument now made by the United States was neither made below by the State of Michigan nor relied upon by the Michigan Supreme Court as a ground for its decision. Petitioner acknowledges that it is appropriate for the Court to consider the new argument for affirmance being offered by the United States. But the United States can hardly offer a new ground for affirmance of the lower court decision, and then attempt to preclude arguments in opposition to that ground on the basis that they were not raised below.

2. Procedural Due Process Requires Placement Of The Burden Of Proving Culpability On The State In Forfeiture Cases

Neither the United States nor the State of Michigan provide any real challenge to the application of the three-part test of *Mathews v. Eldridge*, 424 U.S. 319 (1976) to determine who should bear the burden with respect to whatever substantive standard for culpability is established by the Court. (Pet. Br. 39-44). The United States asserts only that the *Mathews* test "does not assist her" because it "is . . . entirely reasonable to burden the party more likely to have information relevant to the facts . . . to demonstrate th[ose] facts. . . . " (U.S. Br. 24) (citing *Concrete Pipe & Products of California, Inc. v. Construction Laborers Pension Trust*, 113 S. Ct. 2264, 2281 (1993) (relying on W. Bailey, *Onus Probandi* 1 (1886)).[13]

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[13] The *Onus Probandi* treatise relied upon by *Concrete Pipe* does not support the United States' argument regarding the appropriate burden allocation in this case. Discussing burdens of persuasion in the specific context of nuisance actions, the treatise states that "[i]f the nuisance be predicated upon acts of non-feasance, the facts creating the duty must be proved, and the defendant's neglect established." W. Bailey, *Onus Probandi* 234 (1886). Consistent with that common law burden allocation, a number of Michigan cases preceding the Michigan Supreme Court's decision in this case had disregarded the language of the nuisance abatement statute and held not only that knowledge of the misuse was required, but also that the State had the burden of proving such knowledge. *See e.g., State ex rel. Patterson v. Motorama Motel Corp.*, 307 N.W.2d 349, 351-52 (Mich. Ct. App. 1981) (Prosecutor's complaint dismissed because of "fail[ure] to allege . . . knowledge, consent or acquiescence"); *State ex rel. Wayne County Prosecuting Attorney v. Levenburg*, 280 N.W.2d 810, 811 n.1 (Mich. 1979) ("judgment for abatement . . . cannot be rendered without a finding of knowledge . . . on the part of the owners or operators of the place found to be a

The argument of the United States ignores the onerous difficulties faced by an owner who bears the burden of proof under either a negligent entrustment or "all reasonable steps" standard for culpability. Generally, a person who wishes to prove lack of actual knowledge of an illegal use will do so by denying such knowledge, which may or may not be believed. Proving lack of *reason to know* of an impending illegal use is even more problematic. Essentially, it requires an owner like Tina Bennis to reconstruct moments of her life preceding the transfer of property and recollect those facts she became aware of that might overcome the presumption of a guilty state of mind. The number of facts is potentially limitless and may extend well back in time. And because the government has no obligation to allege that the owner knew of specific facts that should have put her on notice, she is left to guess the facts for which she must disprove knowledge in order to make out a defense. In most cases, the owner can do little more than deny knowledge of such facts. The United States apparently regards Tina Bennis's denial that she had any knowledge of her husband soliciting prostitutes as insufficient to establish lack of constructive knowledge. (U.S. Br. 25, n.15). But what else besides this denial can she offer to prove her lack of knowledge of such activity?

The same kinds of difficulties confront an owner who is required to prove that she "took all reasonable steps" to prevent misuse, because what is "reasonable" depends on what she knew or should have known. And where, as here, the government cannot (or will not) even identify any reasonable steps the owner should have taken, placing the burden on owners would require them to guess

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nuisance and their acquiescence in those activities"); J.A. 32 (Michigan Court of Appeals decision in *Bennis*).

what it is they must prove in order to establish innocent owner status.

In her principal brief, petitioner argued that, regardless of who should constitutionally bear the burden of proving owner culpability in *in rem* forfeitures of the kind involved in *Calero-Toledo*, at the very least the Court should place that burden on the State in an *in personam* forfeiture. (Pet. Br. 39 and 45 n.25). The United States responds by suggesting that forfeiture proceedings can be brought *in rem* or *in personam* interchangeably, and that there are no distinctions of any constitutional significance between the two types of proceedings with respect to where the burden of proof should lie. (U.S. Br. 23). Petitioner was simply acknowledging the historical precedent for the burden shift in *in rem* actions and suggesting that, whatever relevance that history might have to the constitutionality of burden-shifting in *in rem* proceedings, it could not support the burden shift in *in personam* proceedings, where there is no such historical precedent. (Pet. Br. 45 n.25).[14] If this Court agrees with the United States that the historical distinctions between those proceedings are of no constitutional import, and also agrees with the due process analysis conducted by petitioner, then this would mean that the Court would be justified in ruling that the burden of proof must lie with the State in either of the two types of forfeiture proceedings.[15]

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[14] *See Austin*, 113 S. Ct. at 2814 (Scalia, J., concurring) (noting the "common law distinctions" between *in rem* and *in personam* forfeitures, including the "burden of proof").

[15] The Court has not addressed the burden of proof issue in forfeiture proceedings in many years, and its nineteenth century decisions on that issue are somewhat difficult to reconcile with one another. In an early decision, *United States v. The Brig Burdett*, 34 U.S. (9 Pet.) 682, 689 (1835), the Court, characterizing the forfeiture proceeding as "highly penal," actually required that

The United States next points out that all of the federal courts of appeal to consider the issue have rejected due process challenges to the burden of proof allocation in the federal drug forfeiture statute, 21 U.S.C. § 881, which simply incorporates the burden allocation for customs matters. (U.S. Br. 23 & n.13). It argues that if the statutory burden of proof allocation under § 881 is constitutional, then the burden of proof for any constitutional protection from forfeiture should also remain with the owner. But all of the federal circuit cases cited by the United States were decided prior to this Court's decision in *Austin*, and their holdings have, at the very least, been seriously undermined by that decision.[16] *Austin* made

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the illegal acts for which forfeiture was sought be "established beyond a reasonable doubt." *Lilienthal's Tobacco v. United States*, 97 U.S. 237 (1878) is the last decision of this Court to have ruled on the burden of proof issue in a forfeiture context. In *Lilienthal's*, an *in rem* forfeiture proceeding initiated for failure to pay federal tobacco taxes, the Court distinguished *The Brig Burdett* and held that the government bore the burden of proving by a preponderance of the evidence the allegations giving rise to the forfeiture. 97 U.S. at 266, 271-72; *see also United States v. Regan*, 232 U.S. 37, 49 (1914) (discussing *Lilienthal's* and *The Brig Burdett*).

[16] In recent years, other courts have begun to question the propriety of the burden shift in § 881. *See, e.g., United States v. Leasehold Interest in 121 Nostrand Ave.*, 760 F. Supp. 1015, 1032 (E.D. N.Y. 1991) ("On constitutional as well as policy grounds there is doubt about the propriety of shifting the burden of proof in quasi-criminal proceedings to leaseholders. . . . The law would be much more comfortable with a forfeiture scheme that, at least in the case of homes, placed the entire burden on the Government to establish that forfeiture is warranted with a standard that is higher than a preponderance."); *United States v. Twelve Thousand, Three Hundred Ninety Dollars*, 956 F.2d 801, 808 (8th Cir. 1992) ("The ease with which title to property may be divested is a constitutional infirmity that cries out for closer

clear that forfeitures effected under § 881(a) are punitive, rather than remedial, in nature. (Pet. Br. 19-20). Yet, in concluding that the burden shift in § 881 did not violate due process, the only two federal court of appeals decisions cited by the United States that analyzed the issue in any depth relied heavily on the contrary view that forfeiture under that section was primarily remedial, rather than punitive, in nature. *See United States v. $2,500 in U.S. Currency*, 689 F.2d 10, 13, 14 (2d Cir. 1982) (stating that § 881(a) serves "broad remedial purposes"; characterizing forfeiture of vehicles as "remedial"; and stating that "any punitive effect is incidental"), *cert. denied*, 465 U.S. 1099 (1984); *United States v. Santoro*, 866 F.2d 1538, 1543 & n.5 (4th Cir. 1989) (stating that "the remedial, non-punitive purposes of 21 U.S.C. § 881 are extremely strong" and that any punitive impact of § 881(a)(7) "is clearly ancillary to the provision's remedial, non-punitive purposes").[17] Moreover, none of the cases cited by the United States employed a *Mathews* due process analysis to determine whether the government should bear the burden of proof.

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scrutiny by this court and the imposition of stricter standards of proof") (Beam, J., dissenting).

[17] Nor can historical considerations be invoked to support the constitutionality of the burden shift in § 881(a). *See United States v. James Daniel Good Real Property*, 114 S. Ct. at 515 (Thomas, J. concurring in part and dissenting in part) (saying that a "strong argument can be made . . . that § 881(a)(7) . . . differs . . . in kind . . . from its historical antecedents") and at 517 (suggesting that § 881 has "all but detached [itself] from the ancient notion of civil forfeiture"). The early *in rem* forfeiture statutes were limited in scope to customs and navigational matters. *See C.J. Hendry Co. v. Moore*, 318 U.S. 133, 152 (1943); Inst. Just. Br. 8-9. They were originally justified by the difficulties in obtaining *in personam* jurisdiction over owners of vessels to satisfy claims against them arising out of violations of customs and maritime law. (*See* Inst. Just. Br. 9-10; Pet. Br. 45 n.25).

In response to Tina Bennis's argument that the quasi-criminal nature of forfeiture proceedings is another factor which supports placing the burden of proving owner negligence on the State, the United States responds with two arguments. First, it states that this argument "is at odds with this Court's consistent refusal to hold that civil forfeiture proceedings are 'subject to the procedural rules governing criminal prosecutions.' " (U.S. Br. 24) (citation omitted). This statement overlooks two modern decisions in which the Court deemed civil forfeiture to be "criminal" for purposes of a constitutional protection that applies to criminal cases. *See United States v. United States Coin & Currency*, 401 U.S. 715, 718 (1971) (Fifth Amendment privilege against self-incrimination applies to forfeiture proceedings because, although "civil in form, [they] are in their nature criminal for Fifth Amendment purposes") (citation omitted) (internal quotation marks omitted); *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 700, 702 (1965) (Because the "object [of a civil forfeiture proceeding], like a criminal proceeding, is to penalize for the commission of an offense against the law," the Fourth Amendment exclusionary rule applies to such proceedings).[18] Second, the United States argues that

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[18] Even where an owner is able to establish innocence under a forfeiture statute that places the burden on him, the costs of doing so can be staggering. In *United States v. One Parcel of Real Estate, supra*, the government sought forfeiture of a 5,000 acre parcel of land after discovering the wreckage of a plane that had crashed on an adjacent parcel of land. Although no drugs were found at the crash site, the government contended that the "intended" landing area for the plane was the defendant property, and that it was to have dropped off a load of cocaine there. 852 F. Supp. at 1019. The District Court concluded after lengthy litigation that the owner of the property "presented essentially undisputed evidence that it had no knowledge whatsoever of any drug trafficking taking place on its property," and that it

even if the proceeding to divest petitioner of her property were criminal in nature, the State would still be permitted to allocate the burden of proof to Tina Bennis on the issue of her guilt or innocence. (U.S. Br. 24). That proposition is fundamentally at odds with settled due process principles. If the State made it a crime to negligently entrust property to another who misuses the property, and punished that crime by requiring forfeiture of the misused property, the State could not, consistent with due process, make the defendant bear the burden of proving that the elements of the offense were not satisfied. *See e.g., Mullaney v. Wilbur*, 421 U.S. 684, 685, 704 (1975) (due process requires that the State prove beyond a reasonable doubt every fact necessary to constitute the crime charged).

The State of Michigan concedes not only that forfeiture under the nuisance abatement act is punishment for criminal wrongdoing, but also that these proceedings are "a prime example of an inexpensive, cost-effective, non-docket-clogging alternative to prosecution and imprisonment." (See Pet. Br. 21) (quoting from respondent's brief in the Michigan Supreme Court proceedings). Presumably the very feature that makes civil forfeiture attractive to the State as an alternative to prosecution is

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"met its burden by proving by more than a preponderance of the evidence that it had no knowledge of any intended use of its property as a landing site for the allegedly drug-laden . . . [airplane] that crashed in early February 1986." *Id.* at 1040. Newspaper accounts of the case indicate that the owner of the property incurred more than $700,000 in legal fees to carry its burden of proof. *See* S. Nesmith, *Family Fights for Reputation, $700,000 in Legal Fees*, Palm Beach Post, Nov. 13, 1994, at 1A. For a discussion of other innocent owners who have been aggrieved by the burden of proof allocation in forfeiture actions, see Note, *Seizure of Third Party's Property Associated with Drug Money: Requiring Third Parties to Become Private Police?*, 23 Sw. U. L. Rev. 79, 88-91 (1993).

that, to date, it has not been subject to most of the constitutional safeguards that apply in criminal cases.[19] As the law now stands, the State, *inter alia*, does not have to provide counsel, it does not have to prove its allegations beyond a reasonable doubt, it can deny the defendant her "confrontation" rights, and (at least in "equitable" proceedings like this one) it does not have to honor a request for a jury trial. (*See* Pet. Cert. 23 n.20). This Court is being asked to continue the trend of its recent forfeiture decisions, which have extended constitutional protections to civil forfeiture proceedings, and hold that the burden of proving culpability in such proceedings lies with the State.

3. The Takings Clause Likewise Requires Placement Of The Burden of Proving Culpability On The State

Relying on this Court's recent takings jurisprudence, petitioner also argues that, because forfeiture involves a direct appropriation of property, the forfeiture is presumptively a taking, and that the government must bear the burden of proving any exception (e.g., owner culpability) to the requirement to pay just compensation. (Pet. Br. 44). The United States counters by citing to two federal court of appeals decisions, one of which suggests that forfeitures do not implicate any takings issues so long as the government's actions comport " 'procedurally

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[19] These procedural advantages also induce defendants to settle forfeiture cases. In oral argument before the Michigan Supreme Court, counsel for respondent implied that owners who are alleged to have committed a nuisance readily pay cash settlements in exchange for return of their vehicles because the proceeding is a "civil matter and we could call them as a witness and they kn[o]w that up front. . . . " (Tr. Or. Arg. 11). *But see United States v. United States Coin and Currency, supra.*

and substantively' " with the provisions of a lawfully enacted forfeiture statute. (U.S. Br. 24-25) (citation omitted). Both of the federal appellate cases pre-date this Court's decisions in *Lucas v. South Carolina Coastal Council, supra,* and *Dolan v. City of Tigard,* 114 S. Ct. 2309 (1994). Petitioner submits that those decisions have established a significantly higher level of judicial scrutiny of direct appropriations of property such as forfeiture than that which is urged by the United States.

To countenance the view that "mere property rights" (J.A. 25) are at stake in civil forfeiture, and that the State is relieved of any burden whatsoever to justify the appropriation of a citizen's property by this device, would relegate the Takings Clause "to the status of a poor relation," *Dolan,* 114 S. Ct. at 2320, with respect to the other constitutional safeguards in the Bill of Rights.

CONCLUSION

For the foregoing reasons and those stated in petitioner's opening brief, it is respectfully submitted that the judgment of the Michigan Supreme Court as to petitioner should be reversed.

Respectfully submitted,

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October 1995

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether the Due Process Clause of the Fourteenth Amendment precludes a State from forfeiting a wife's interest in a car that her husband, a co-owner of the car, used in violation of state law, when the wife did not know that he would use it illegally.

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In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 94-8729

TINA B. BENNIS, PETITIONER

v.

STATE OF MICHIGAN

ON WRIT OF CERTIORARI
TO THE MICHIGAN SUPREME COURT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

INTEREST OF THE UNITED STATES

This case concerns the extent to which the Constitution limits the forfeiture of property owned by a person who was unaware of and uninvolved in the criminal conduct on which forfeiture was based. The United States seeks forfeiture of the proceeds and instrumentalities of criminal activity under various federal statutes. Although many of those federal statutes expressly limit the forfeiture of the property of an "innocent owner," some of them do not. See 31 U.S.C. 5317 (1988 & Supp. V 1993); 19 U.S.C. 1595a (1988 & Supp. V 1993); 18 U.S.C. 1955; 18 U.S.C. 545. Moreover, some federal statutes that do contain innocent owner provisions have been construed in light of courts' views of applicable constitutional limits. See,

e.g., *United States* v. *141st Street Corp.*, 911 F.2d 870, 877 (2d Cir. 1990), cert. denied, 498 U.S. 1109 (1991). The Court's decision in this case is therefore likely to affect federal forfeiture proceedings.

STATEMENT

1. On October 3, 1988, two Detroit, Michigan, police officers saw petitioner's husband, John Bennis, stop the 1977 Pontiac he was driving and pick up a woman in an area frequented by prostitutes. When the officers approached the car moments later, they saw Mr. Bennis and the woman engaged in sexual activity in the front seat. Based on that incident, Mr. Bennis was arrested and later convicted of gross indecency, in violation of Mich. Comp. Laws Ann. § 750.338b (West 1987). In addition, the prosecutor for Wayne County, Michigan, brought an action against Mr. Bennis and petitioner, as co-owners of the car, seeking its abatement. J.A. 2-6, 46-47; see Mich. Comp. Laws Ann. §§ 600.3805, 600.3810(2) (West 1987).

Michigan law declares that "[a]ny * * * vehicle * * * used for the purpose of lewdness, assignation, or prostitution" is a nuisance. Mich. Comp. Laws Ann. § 600.3801 (West 1987 & Supp. 1995). The law authorizes an action for abatement against the owners of the property alleged to be a nuisance. Mich. Comp. Laws Ann. §§ 600.3805, 600.3810(2) (West 1987). In such an action, "[p]roof of knowledge of the existence of the nuisance on the part of the defendants or any of them, is not required." Mich. Comp. Laws Ann. § 600.3815(2) (West 1987). The law provides that, when a vehicle is found to be a nuisance, the court must order its sale. Mich. Comp. Laws Ann. § 600.3825(1) through (3) (West 1987). The proceeds of the sale are used first to pay the expenses of the sale and then to

pay any liens "created without the lienor having any notice that such property was being used or was to be used for the maintenance of a nuisance"; any balance goes into the general fund of the state treasury. Mich. Comp. Laws Ann. § 600.3825(3) (West 1987).

In their answer to the complaint for abatement of their car, the Bennises alleged as an affirmative defense that the complaint "failed to plead any facts or allegations that [petitioner] had any knowledge of the alleged nuisance." Answer at 3. They also alleged that the abatement statute was unconstitutionally "vague and overbroad" (*ibid.*), but they did not otherwise challenge its constitutionality.

At a bench trial in the Third Circuit Court for Wayne County, the prosecutor presented testimony by the arresting officers and people from the neighborhood of the arrest. A security guard who worked in the neighborhood testified that he saw Mr. Bennis solicit prostitutes in the area on two occasions before his arrest. Tr. 144-145; see also J.A. 52-53. The only defense witness was petitioner. She described how she and her husband bought the car and then testified as follows about her knowledge of his conduct (J.A. 9):

> Q. Were you present with your husband when he was driving home from work on October 3rd?
>
> A. No.
>
> Q. Did you have any knowledge that your husband was going to do anything but come directly home from work?
>
> A. No.
>
> Q. Do you have any knowledge of your husband soliciting prostitutes?
>
> A. No.

The trial court entered a judgment of abatement, ordering the sale of the Bennises' car. J.A. 27-28. The court did not address petitioner's claim that her lack of knowledge of her husband's illegal use of the car barred the forfeiture. See J.A. 13-26.

2. The Michigan Court of Appeals reversed by a 2-1 vote. J.A. 29-44. It acknowledged that the abatement statute appeared to make it irrelevant whether petitioner knew of her husband's illegal conduct. J.A. 31. Relying on *People* v. *Schoonmaker*, 216 N.W. 456 (Mich. 1927), however, the court held that the statute required the prosecutor "to demonstrate that defendants knew of the use of the vehicle as a nuisance." J.A. 30. It also held that the record did not prove that petitioner had such knowledge. J.A. 32. As an alternative ground for reversal, the court held that Mr. Bennis's conduct did not constitute a nuisance under state law, because it was not continuing in nature and because there was no "proof that the [sexual] activit[y] * * * [was] in exchange for [money]." J.A. 35.

3. The Michigan Supreme Court, by a 4-3 vote, reversed the court of appeals' decision and upheld the abatement of the car. J.A. 45-97. Three justices joined in a written opinion for reversal, and a fourth justice concurred in that result. J.A. 45-71. The three remaining justices dissented; two of them issued written dissents. J.A. 71-88, 88-95.

The three-judge plurality concluded, first, that the abatement comported with state law. J.A. 48-66. It held that Mr. Bennis used the car for an act of "lewdness, assignation, or prostitution" within the meaning of the abatement statute, see J.A. 48-54, and thereby contributed to the existence of a public nuisance, see J.A. 54-63. It further held that, "[i]n light of the

plain language of the nuisance abatement statute" and case law after *Schoonmaker*, "the statute expressly obviates the requirement that an owner consent to or acquiesce in the illegal use of the property." J.A. 65.

The plurality next held that the forfeiture of petitioner's interest in the car did not violate the federal Constitution. J.A. 66-70. It based that holding on *Van Oster* v. *Kansas*, 272 U.S. 465 (1926), which rejected a due process challenge to the forfeiture of a vehicle by an owner who lacked knowledge of the illegal conduct that formed the basis for the forfeiture, and on *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663, 683 (1974), which reaffirmed that "the innocence of the owner of property subject to forfeiture has almost uniformly been rejected as a defense." J.A. 66-68. In light of those decisions, the plurality stated that petitioner's claim of a lack of knowledge of her husband's illegal purpose "is without constitutional significance." J.A. 68.

Neither dissenting opinion disagreed with the plurality's analysis of the federal constitutional issue. Indeed, one of the dissenting opinions, which was joined by all three dissenting justices, stated that "abating the property of innocent owners in forfeiture actions arguably does not violate an owner's constitutional right to due process." J.A. 80-81.

SUMMARY OF ARGUMENT

A. We agree with this Court's suggestion in *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974), that the Constitution generally bars the punitive forfeiture of property from an owner who alleges and proves that he took all steps that reasonably could be expected to prevent the illegal conduct that led to forfeiture. Applied in the present

context, the "all reasonable steps" standard is consistent with this Court's precedents and reasonably accommodates governmental and private interests.

B. The "all reasonable steps" standard does not necessarily apply in all contexts, however. The present case involves the forfeiture of non-contraband under a statute that the State has indicated is intended to be punitive, as applied in the present context. This Court need not resolve the existence and nature of an innocent owner defense in other contexts. Moreover, respondent does not rely on traditional principles of vicarious liability to contend that petitioner should be deemed to have had knowledge of, or responsibility for, the illegal conduct that led to forfeiture. In an appropriate case, those principles could defeat innocent owner status.

C. Under *Calero-Toledo*, petitioner bore the burden of alleging and proving that she took all reasonable steps to prevent the illegal use of her property. Like the property owner in *Calero-Toledo*, petitioner failed to plead or prove those issues. In particular, petitioner did not allege or prove that she lacked reason to know of the unlawful conduct and that she took reasonable action under the circumstances to prevent it.

D. This Court should reject the "reasonable entrustment" standard that petitioner proposes. In many cases, an owner can reasonably be expected to take precautions against illegal use of his property after, as well as before, entrusting it to someone else. The Court should also reject petitioner's argument that a spouse who lacks actual knowledge or reason to know of illegal conduct by the other spouse can never

be expected to take affirmative precautions in regard to jointly owned property.

ARGUMENT

THE ABATEMENT OF THE VEHICLE COMPORTS WITH THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT

A. The Constitution Bars The Punitive Forfeiture Of Property When The Owner Alleges And Proves That He Took All Reasonable Steps To Prevent Illegal Use Of The Property

In a long line of cases, this Court has upheld the forfeiture of property that has been used illegally, even though the owner of the property was unaware of and uninvolved in the illegal use. The Court has also suggested, however, that the Constitution might bar a forfeiture if the owner alleges and proves that he took all steps that could reasonably be expected to prevent the illegal use. In our view, there are situations in which such a showing by an owner would establish a constitutional defense. As applied in the context of this case, the "all reasonable steps" standard recognizes the interest of blameless property owners without thwarting the legitimate purposes of forfeiture statutes.

1. In *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974), this Court reviewed its decisions concerning "innocent owner" claims in forfeiture cases. Surveying a consistent course of decisions, the Court noted that "the innocence of the owner of property subject to forfeiture has almost uniformly been rejected as a defense." *Id.* at 683 (discussing *The Palmyra*, 25 U.S. (12 Wheat.) 1 (1827); *United States* v. *Cargo of Brig Malek Adhel*, 43 U.S. (2 How.) 210,

233-235 (1844) (Story, J.); *Dobbins's Distillery* v. *United States*, 96 U.S. 395, 399-401 (1878)). See also *United States* v. *92 Buena Vista Avenue*, 113 S. Ct. 1126, 1132 (1993) (plurality opinion) (noting the historic availability of forfeiture "notwithstanding the innocence of the owner"). The Court in *Calero-Toledo* took particular note of two cases decided this century that had rejected innocent owner claims involving, as does this case, the forfeiture of vehicles from owners who were unaware of and uninvolved in the unlawful conduct that supported the forfeiture action. See 416 U.S. at 685-686.

In *J.W. Goldsmith, Jr.-Grant Co.* v. *United States*, 254 U.S. 505, 509 (1921), the Court upheld against a due process challenge the forfeiture of a taxicab used to transport alcohol in violation of federal law, even though the owner of the taxicab (a dealer in cars who had retained title while financing the purchase) had no knowledge, or even "any notice or reason to suspect," that the car would be used illegally. Likewise, in *Van Oster* v. *Kansas*, 272 U.S. 465, 466-469 (1926), the Court upheld the forfeiture of a car used to transport intoxicating liquor, in violation of state law, by a person to whom the owner had entrusted the car. The Court rejected the owner's claim that due process entitled her to resist the forfeiture because she lacked knowledge of, and did not authorize, the illegal use. *Id.* at 467-468. See also *United States* v. *One Ford Coupe Automobile*, 272 U.S. 321, 332 (1926).

The Court in *Calero-Toledo* identified several rationales for why "[j]udicial inquiry into the guilt or innocence of the owner could be dispensed with." 416 U.S. at 686. As *Goldsmith-Grant Co.* had explained, by authorizing the forfeiture of property used in

crimes regardless of the owner's knowledge of or involvement in the crimes, "Congress interposes the care and responsibility of their owners in aid of the prohibitions of the law and its punitive provisions." 254 U.S. at 510, quoted in *Calero-Toledo*, 416 U.S. at 685-686. And, as *Van Oster* had noted, forfeiture laws that apply without regard to the owner's knowledge of or involvement in criminal activity "build[] a secondary defense against a forbidden use and preclude[] evasions by dispensing with the necessity of judicial inquiry as to collusion between the wrongdoer and the alleged innocent owner." 272 U.S. at 467-468, quoted in part in *Calero-Toledo*, 416 U.S. at 686.

The Court in *Calero-Toledo* concluded that, even if a statutory forfeiture scheme affords no defense to "innocents," it is nonetheless constitutional, in light of "[t]he historical background of forfeiture statutes in this country and this Court's prior decisions sustaining their constitutionality." 416 U.S. at 680. The Court then applied that view to the facts before it. In that case, Puerto Rico forfeited a yacht on which the Puerto Rico police found marijuana that had apparently been brought on board by one of the yacht's lessees. *Id.* at 665. The yacht company-lessor "was neither involved in nor aware of the act of the lessee which resulted in the forfeiture." *Id.* at 664; see also *id.* at 668. The Court rejected the yacht company's contention that the forfeiture violated the Just Compensation Clause. See *id.* at 680-690. The Court determined that, as applied to conveyances used in connection with drug crimes, the Puerto Rico forfeiture statutes "foster[ed] the purposes served by the underlying criminal statutes, both by preventing further illicit use of the conveyance and by imposing an eco-

nomic penalty, thereby rendering illegal behavior unprofitable." *Id.* at 687. The Court further determined that, as "applied to lessors, bailors, or secured creditors who are innocent of any wrongdoing," those statutes "may have [had] the desirable effect of inducing them to exercise greater care in transferring possession of their property." *Id.* at 688.

While reaffirming its prior decisions, the Court in *Calero-Toledo* stated that the "broad sweep" of forfeiture statutes could "give rise to serious constitutional questions" with respect to two categories of owners:

> It * * * has been implied that it would be difficult to reject the constitutional claim of an owner whose property subjected to forfeiture had been taken from him without his privity or consent. Similarly, the same might be said of an owner who proved not only that he was uninvolved in and unaware of the wrongful activity, but also that he had done all that reasonably could be expected to prevent the proscribed use of his property[.]

Calero-Toledo, 416 U.S. at 689 (citations omitted). The Court found it unnecessary to decide whether the Constitution precluded forfeiture in those two situations, because the yacht company "voluntarily entrusted the lessees with possession of the yacht, and no allegation ha[d] been made or proof offered that the [yacht] company did all that it reasonably could to avoid having its property put to an unlawful use." *Id.* at 690; see also *Austin* v. *United States*, 113 S. Ct. 2801, 2809 & n.10 (1993) (reserving question whether due process principles would bar punitive forfeiture of property "when the owner had done all that reasonably could be expected to prevent the unlawful use of his property").[1]

2. The "all reasonable steps" standard suggested in *Calero-Toledo* has been widely accepted as a constitutional limit on statutory forfeitures. The lower federal courts have generally held that it provides the constitutional limit on civil forfeiture of property that has been used in violation of federal statutes.[2]

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[1] Petitioner contends that the analysis of this Court's precedents in *Austin* provides "a historical basis for the due process principle implicitly recognized in" *Calero-Toledo*. Pet. Br. 19. *Austin*'s reservation of the due process issue, however, indicates that the Court viewed its precedents as inconclusive. In fact, before *Calero-Toledo*, those precedents had reserved only the narrow question whether property could be forfeited if it was taken without the owner's consent and then put to an unlawful use. See *Van Oster*, 272 U.S. at 467 ("It is unnecessary for us to inquire whether the police power of the state extends to the confiscation of the property of innocent persons appropriated and used by the law breaker without the owner's consent."); *Goldsmith-Grant Co.*, 254 U.S. at 512 (reserving "opinion as to whether the [statute in question] can be extended to property stolen from the owner or otherwise taken from him without his privity or consent"). Petitioner also errs in claiming support for an innocent owner defense in *Austin*'s holding that the Eighth Amendment's Excessive Fines Clause applies to civil forfeiture under 21 U.S.C. 881(a). Pet. Br. 18 n.12. Contrary to petitioner's suggestion, the Court did not adopt a specific test of proportionality for all civil forfeitures that "presupposes" a culpable owner (*ibid.*). Indeed, the Court explicitly declined to formulate a constitutional standard for proportionality that depended on that or any other factor. 113 S. Ct. at 2812 & n.15.

[2] See *United States* v. *$69,292 in U.S. Currency*, No. 93-56545 (9th Cir. Aug. 7, 1995), slip op. 3; *United States* v. *One 1976 Cessna Model 210L Aircraft*, 890 F.2d 77, 80-82 (8th Cir. 1989); *United States* v. *1966 Beechcraft Aircraft*, 777 F.2d 947,

Courts have also relied on the standard to interpret the scope of statutory innocent owner defenses.[3] In a similar vein, the federal government has incorporated the "all reasonable steps" standard into regulations governing the remission and mitigation of forfeitures.[4] And some state courts have construed their forfeiture statutes to protect claimants who meet the "all reasonable steps" standard. See, *e.g.*, *Threlkeld* v. *State*, 586 So. 2d 756, 759 (Miss. 1991) (construing state forfeiture statute to avoid violation of state constitution's due process guarantee); *State* v. *1979 Pontiac Trans Am*, 487 A.2d 722, 726-727 (N.J. 1985) (construing state statute to avoid violation of Fourteenth Amendment Due Process Clause); see also N.J. Stat. Ann. § 2C:64-5(b) (West Supp. 1995) (codifying "all reasonable steps" standard).

In our view, the "all reasonable steps" standard articulated in *Calero-Toledo* reflects the constitutional limit applicable to some forfeiture statutes, including the one at issue in this case. As this Court's many cases rejecting innocent owner claims demonstrate, see pp. 7-8, *supra*, the Constitution does not bar forfeitures when all that the owner establishes is

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951-952 (4th Cir. 1985); *United States* v. *One 1982 28' International Vessel*, 741 F.2d 1319, 1322-1323 (11th Cir. 1984); *United States* v. *One Tintoretto Painting*, 691 F.2d 603, 607 (2d Cir. 1982); *United States* v. *One 1957 Rockwell Aero Commander 680 Aircraft*, 671 F.2d 414, 418 (10th Cir. 1982); *United States* v. *$6,700 in U.S. Currency*, 615 F.2d 1, 3 (1st Cir. 1980).

[3] See *United States* v. *141st Street Corp.*, 911 F.2d 870, 877 (2d Cir. 1990), cert. denied, 498 U.S. 1109 (1991); *United States* v. *One 1980 Bertram 58' Motor Yacht*, 876 F.2d 884, 888 (11th Cir. 1989).

[4] See 28 C.F.R. 9.5(b)(5); see also *Calero-Toledo*, 416 U.S. at 689 n.27.

lack of knowledge, or reason to know, of the illegal conduct that caused the forfeiture, and lack of participation in that conduct. As *Calero-Toledo* reaffirmed, when an owner can do no more than demonstrate those conditions, forfeiture statutes serve "legitimate governmental interests," 416 U.S. at 688, because they give property owners an incentive to take affirmative steps to detect and prevent the illegal use of their property, and they eliminate the need for judicial inquiry into the possibility that the alleged innocent owner is in collusion with the person making illegal use of the property. Those traditional justifications for rejecting "innocent owner" claims reflect the heavy burden that is permissibly placed on the property owner to prevent, if reasonably possible, the involvement of his property in illegal activity.

In contrast, when an owner pleads and proves that he took all reasonable steps to prevent the involvement of his property in the illegal conduct underlying the forfeiture, the balance of interests is different. An owner who "ha[s] done all that reasonably could be expected to prevent the proscribed use of his property," *Calero-Toledo*, 416 U.S. at 689, has, by definition, minimized the foreseeable risk of illegal use and, in turn, the risk of forfeiture. Once the owner has minimized the risk of forfeiture by taking all reasonable precautions, he is generally unlikely to take additional, "ultrareasonable" steps to eliminate the residual risk. Moreover, an owner who can prove that he took all reasonable, affirmative measures to prevent unlawful use is far less likely to be in collusion with the person who uses the property illegally than is an owner who merely asserts lack of knowledge or participation in the illegal use.

In light of those considerations, we believe that the *Calero-Toledo* Court correctly suggested that the "legitimate governmental interests" traditionally served by forfeiture statutes would not be furthered as applied to owners who took all reasonable steps to prevent the illegal use, and that the deprivation of such owners' property interests might be regarded as "unduly oppressive." *Calero-Toledo*, 416 U.S. at 688, 690. Due process principles have long afforded protection from punitive government action against essentially blameless individuals who did all that could reasonably be expected under the circumstances. As long ago as *Peisch* v. *Ware*, 8 U.S. (4 Cranch) 347, 363 (1808), Chief Justice Marshall wrote that "a forfeiture can only be applied to those cases in which the means that are prescribed for the prevention of a forfeiture may be employed." In *Southwestern Telegraph & Telephone Co.* v. *Danaher*, 238 U.S. 482, 490-491 (1915), the Court invalidated a penalty against a telephone company under the Due Process Clause of the Fourteenth Amendment because it was "plainly arbitrary and oppressive" in light of the telephone company's innocent conduct, which involved "no intentional wrongdoing; no departure from any prescribed or known standard of action, and no reckless conduct." See *TXO Production Corp.* v. *Alliance Resources Corp.*, 113 S. Ct. 2711, 2718 n.17 (1993) (plurality opinion) (noting substantive due process limits on penalties and observing that *Danaher* had "emphasized the fact that the Company was punished for conduct that had been undertaken in complete good faith"); *id.* at 2731 (O'Connor, J., dissenting) (quoting *Danaher*). And in a related context, this Court has upheld strict, vicarious criminal liability

for a corporate officer based on his company's conduct, provided that the defendant was not " 'powerless' to prevent or correct the violation." *United States* v. *Park*, 421 U.S. 658, 673 (1975).[5]

There are, of course, many different types of forfeiture statutes. Whether a constitutional "innocent owner" defense may be asserted will vary depending on the particular governmental interests the statute serves and the nature of the property that is affected. See pp. 16-21, *infra*. But in some cases, a property owner who makes the showing that he took "all reasonable steps" to prevent the illegal use will have established a constitutional defense to the forfeiture of his property.[6]

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[5] The Court in *Calero-Toledo* supported the "all reasonable steps" standard primarily by referring to the early common law history that "sought to mitigate the harshness of felony and deodand forfeitures" and the "ameliorative policy" both in England and in this country "of providing administrative remissions and mitigations of statutory forfeitures in most cases where the violations are incurred 'without willful negligence' or an intent to commit the offense." 416 U.S. at 689 n.27. That history does not appear to establish the specific contours of any right possessed by innocent owners; at most, it indicates a general concern to provide some mechanism to alleviate harsh forfeitures imposed on "innocent owners" in some instances. Notwithstanding its lack of a clearcut historical pedigree, we believe that the "all reasonable steps" standard rests on values traditionally recognized in due process analysis, accords with this Court's prior decisions, and respects the interests of private property owners, while accommodating governmental interests underlying forfeiture statutes.

[6] Petitioner invokes both the doctrine of substantive due process and the Just Compensation Clause of the Fifth Amendment, as applied to States under the Fourteenth Amendment (see, *e.g.*, *Dolan* v. *City of Tigard*, 114 S. Ct. 2309,

B. The "All Reasonable Steps" Standard Does Not Apply To All Forfeitures Or All Claimants

This case involves only one type of forfeiture and one type of claimant. While we believe that the "all reasonable steps" standard is applicable in this case, the availability and nature of any constitutionally required innocent owner defense in other settings raises different issues and requires a different analysis. The Court need not address those issues in this case.

1. *This case involves the punitive forfeiture of non-contraband based on its use for a vice offense.* It is important, first, to clarify the nature of the property at issue and the nature and purpose of the statute under which it was forfeited.

It appears that, as applied in this case, the Michigan abatement statute serves, to a significant extent,

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2316 (1994)). See Pet. i. Analysis under the Just Compensation Clause, however, does not appear to add anything to the constitutional analysis in this context. In discussing this Court's precedents addressing innocent owner claims, the Court in *Calero-Toledo* did not distinguish the application of just compensation principles from substantive due process principles. For example, in *Goldsmith-Grant Co.*, the Court had considered whether the forfeiture of the owner's property violated "the due process of law required by the Constitution." 254 U.S. at 510. In *Calero-Toledo*, however, the Court stated that *Goldsmith-Grant Co.* had "held that the federal tax-fraud forfeiture statute did not deprive an innocent owner of his property in violation of the Fifth Amendment." 416 U.S. at 685. And the *Calero-Toledo* Court characterized the due process claim at issue in *Van Oster*, 272 U.S. at 466, as simply a "Fourteenth Amendment attack." 416 U.S. at 686. Elsewhere, the Court in *Calero-Toledo* referred simply to the "constitutionality" of the forfeiture of the property of innocent owners. See *id.* at 669, 680, 688, 689.

punitive purposes. The Michigan statute does not merely remedy the illegal use of vehicles by enjoining such use, while leaving title in the vehicles' owners; instead, it requires the vehicles to be sold.[7] While the requirement of sale to compensate the State for the costs associated with illegal conduct might in other contexts support a remedial characterization of the law, here, the State has emphasized the punitive aim of the abatement of the Bennises' car. The State has explained: "Confiscation of an automobile in the context that defendant's car was seized * * * is swift and certain 'punishment' of the voluntary vice consumer. Recidivism is practically nil, and the deterrence value is great." Resp. Mich. Sup. Ct. Br. 22 (quoted at Pet. Br. 20-21).[8]

Under those circumstances, the forfeiture of vehicles under the statute, though characterized as the "abatement" of a "nuisance," does not appear to fall within the "long line of this Court's cases sustaining against Due Process and Takings Clause challenges the State's use of its 'police powers' to

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[7] Whereas vehicles and other chattels are to be sold when they are declared a nuisance, "buildings and places" are to be "effectually clos[ed]" for up to one year when they are declared a nuisance. Mich. Comp. Laws Ann. § 600.3825(1) (West 1987). The Michigan courts have rejected the argument that the closing of buildings and places under the abatement statute is punitive rather than remedial. *State ex rel. Macomb County Prosecuting Attorney* v. *Mesk*, 333 N.W.2d 184, 191 n.4 (Mich. Ct. App. 1983); *State ex rel. Cahalan* v. *Bernstein*, 226 N.W.2d 56, 59 (Mich. Ct. App. 1974).

[8] This case thus does not require the Court to consider how to determine, in the absence of such explicit statements, whether a particular forfeiture provision is punitive or remedial.

enjoin a property owner from activities akin to public nuisances." *Lucas* v. *South Carolina Coastal Council*, 112 S. Ct. 2886, 2897 (1992); see, *e.g.*, *Grosfield* v. *United States*, 276 U.S. 494 (1928) (affirming decree entered under the National Prohibition Act "padlocking" premises used by tenant, without lessor's knowledge, for a still); see also *United States* v. *Boynton*, 297 F. 261, 266-268 (E.D. Mich. 1924); cf. *Sweet* v. *Rechel*, 159 U.S. 380, 399 (1895); *Mugler* v. *Kansas*, 123 U.S. 623, 669 (1887). The abatement of such nuisances does not implicate an innocent owner defense, in our view.

Nor would an innocent owner defense necessarily be available to defeat other types of forfeitures, such as the forfeiture of contraband, "the possession of which, without more, constitutes a crime," *One 1958 Plymouth Sedan* v. *Pennsylvania*, 380 U.S. 693, 699 (1965), or the forfeiture of property specially adapted for illegal use by, for example, being equipped with secret compartments, cf., *e.g.*, *United States* v. *One 1983 Homemade Vessel Named "Barracuda,"* 858 F.2d 643 (11th Cir. 1988) (upholding forfeiture of boat with secret compartments under 19 U.S.C. 1703(a), which authorizes forfeiture of vessels "fitted out" for purpose of violating customs laws). See *United States* v. *Jeffers*, 342 U.S. 48, 54 (1951); see also *United States* v. *One Assortment of 89 Firearms*, 465 U.S. 354, 364 (1984); *One Lot Emerald Cut Stones* v. *United States*, 409 U.S. 232, 237 (1972) (per curiam).

Finally, the State has not suggested that the forfeiture of vehicles under the circumstances of this case is justified by an overriding governmental need. There may be offenses that are so serious, and so closely connected with a certain type of property, that

forfeiture would be justified even if the owner met the "all reasonable steps" standard. As this Court said in *Van Oster*, "certain uses of property may be regarded as so undesirable that the owner surrenders his control [over the property] at his peril." 272 U.S. at 467. The Court cited, as an example, laws that hold car owners civilly liable "for the negligent operation by those entrusted with their use." *Ibid.* Under such laws, it does not matter whether the owner took all reasonable precautions to prevent the negligence. See 7A Am. Jur. 2d *Automobiles & Highway Traffic* § 668, at 900-901 (1980). Nonetheless, the Court in *Van Oster* took it for granted that such laws are constitutional. See 272 U.S. at 467; see also *Young* v. *Masci*, 289 U.S. 253, 257 (1933). The imposition of strict vicarious civil liability under such laws is justified by, *inter alia*, the amount of injury and death due to careless driving. Similar considerations could lead a legislature reasonably to conclude that a specific illegal use of a specific type of property—for example, the use of rental vehicles to transport explosive devices—had produced such serious law enforcement problems that all vehicles so used should be forfeited regardless of whether a rental agency could, in a particular case, show that it had taken all reasonable precautions to prevent the illegal use. Forfeiture in that situation might be warranted to encourage extraordinary precautions against a particularly harmful illegal use. Cf. *New York Central R.R.* v. *White*, 243 U.S. 188, 201-204 (1917).

2. *This case does not involve a claimant to whom knowledge of, or involvement in, the illegal activity is sought to be imputed under traditional principles of vicarious liability.* This case, like *Calero-Toledo*,

involves a claimant who was "uninvolved in and unaware of the wrongful activity" that led to the forfeiture. 416 U.S. at 689. Knowledge of and involvement in wrongful activity may be imputed to a claimant under traditional principles of vicarious liability, but those principles are not at issue here.

The Court has indicated that traditional principles of vicarious liability will support civil punitive damages. In *Pacific Mutual Life Ins. Co.* v. *Haslip*, 499 U.S. 1 (1991), the Court rejected a substantive due process challenge to a state common law rule authorizing punitive damages against corporations for the fraud of employees acting within the scope of employment. *Id.* at 14-15. In support of that ruling, the Court cited *American Society of Mechanical Engineers, Inc.* v. *Hydrolevel Corp.*, 456 U.S. 556 (1982), which permitted the imposition on an organization of treble damages for antitrust violations based on the apparent authority of an agent to act for the organization. See *id.* at 574-576.

Forfeitures may similarly rest on theories of "vicarious liability." *Austin*, 113 S. Ct. at 2810. Agency principles have been applied by the lower courts in civil forfeiture cases. For example, in *United States* v. *One Parcel of Land Located at 7326 Highway 45 North*, 965 F.2d 311 (7th Cir. 1992), the court acknowledged that a corporation's innocent owner defense should be rejected if the knowledge of one of its principal officers could be imputed to the corporation under traditional agency principles. *Id.* at 316-319. (The court held that the officer's knowledge was not imputable in that case, however, because he did not gain it while acting for the benefit of the corporation. *Id.* at 317.) In *United States* v.

141st Street Corp., 911 F.2d 870 (2d Cir. 1990), cert. denied, 498 U.S. 1109 (1991), the court sustained the forfeiture of an apartment house overrun by drug dealers, holding that the corporate owner was chargeable with the knowledge of the superintendent of the building. *Id.* at 876. See also *United States* v. *One Parcel of Real Estate*, 852 F. Supp. 1013, 1039 (S.D. Fla. 1994); *United States* v. *One Parcel of Real Estate Consisting of Approximately 4,657 Acres*, 730 F. Supp. 423, 426-428 (S.D. Fla. 1989).

Respondent has not argued that traditional principles of vicarious liability provide a basis for holding petitioner knowledgeable of, or responsible for, Mr. Bennis's conduct. There is, to our knowledge, no common law tradition that would support the imposition of punitive liability on a spouse based solely on the actions of a partner. Nor has respondent argued that liability may be premised on the "family purpose doctrine"[9] or any other joint enterprise theory.[10] Accordingly, this case does not require the Court to determine when traditional principles of vicarious liability and imputed knowledge may defeat an innocent owner claim.[11]

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[9] See W. Prosser, *Handbook of the Law of Torts* § 73, at 483-485 (4th ed. 1971).

[10] Cf. *United States* v. *One 1986 Chevrolet Monte Carlo*, 817 F. Supp. 729, 730-734 (N.D. Ill. 1993).

[11] We also note that this case does not involve a claimant who acquired an interest in the property after the illegal conduct that caused the forfeiture. The "all reasonable steps" standard would have a different application in that setting. A person who acquires property after the illegal act usually could not have exercised any power to prevent the act from occurring. Nevertheless, the person can be expected to exercise care to avoid acquiring "tainted" property that has been used for an

C. Petitioner Has Not Satisfied The "All Reasonable Steps" Standard

1. *Petitioner bore the burden of pleading and proving that she took all reasonable steps to prevent the illegal use of her property.*[12] This Court made clear in *Calero-Toledo* that, to the extent that the Constitution requires recognition of an innocent owner defense, the owner must bear the burden of pleading and proving it. Thus, the Court found it unnecessary to determine whether the Constitution affords such a defense in *Calero-Toledo* only because "no allegation ha[d] been made or proof offered that the [yacht] company did all that it reasonably could to avoid having its property put to an unlawful use." 416 U.S. at 690. The Court gave no indication that the Constitution required the government to carry any burden of proof on that issue.

Petitioner recognizes that *Calero-Toledo* supports imposing the burden of proving innocent owner status on claimants in *in rem* forfeiture proceedings. Pet. Br. 39. She also recognizes (*id.* at 45 n.25) that the Puerto Rico statute at issue in *Calero-Toledo* was modeled on a federal statute that is governed by the customs procedures set out in 19 U.S.C. 1615, see 416

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illegal purpose that subjects it to forfeiture. A person who fails to take reasonable steps under the circumstances to determine the provenance of what he is acquiring may fail to qualify as an "innocent" owner for constitutional purposes.

[12] Petitioner did not argue in the courts below or in her petition for a writ of certiorari that the State bore the burden of proof on the innocent owner issue. Moreover, it is not clear that the burden-of-proof issue is fairly included within the questions presented in her petition. We address the issue in the event the Court determines that it should be resolved.

U.S. at 686 n.25, 689 n.27, and that Section 1615 places the burden of proof on claimants in forfeiture proceedings with respect to all issues except the showing of probable cause to institute the proceeding. Every federal court of appeals to consider the issue has rejected constitutional challenges to Section 1615's allocation of the burden of proving innocent owner status to the claimant.[13]

Petitioner nonetheless contends that *Calero-Toledo*'s determination that the burden of proof rests on the claimant is inapposite here. She notes that, whereas *Calero-Toledo* involved a proceeding *in rem*, this is a proceeding *in personam*. Pet. Br. 45 n.25. Petitioner fails, however, to explain why that matters. The order declaring the Bennises' vehicle a nuisance and requiring its sale could have been entered in a proceeding *in rem*. See *C.J. Hendry Co.* v. *Moore*, 318 U.S. 133, 140 (1943). Petitioner does not contend that the *in personam* character of the proceeding gave it collateral consequences that would not have flowed from an *in rem* proceeding.

Petitioner also asserts that abatement proceedings are "quasi-criminal," Pet. Br. 43, based on respondent's acknowledgement that they serve punitive and deterrent purposes. Proceedings under the Puerto Rico statute at issue in *Calero-Toledo*, however, were

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[13] See *United States* v. *228 Acres of Land & Dwelling*, 916 F.2d 808, 814 (2d Cir. 1990), cert. denied, 498 U.S. 1091 (1991); *United States* v. *Santoro*, 866 F.2d 1538, 1544 (4th Cir. 1989); *United States* v. *$250,000 in U.S. Currency*, 808 F.2d 895, 900 & n.17 (1st Cir. 1987) (citing cases); *United States* v. *$2,500 in U.S. Currency*, 689 F.2d 10, 12-16 (2d Cir. 1982), cert. denied, 465 U.S. 1099 (1984); *United States* v. *One 1970 Pontiac GTO*, 529 F.2d 65, 66 (9th Cir. 1976) (per curiam).

also said to serve punitive and deterrent purposes. See 416 U.S. at 686. Moreover, petitioner's characterization of the present proceeding is at odds with this Court's consistent refusal to hold that civil forfeiture proceedings are "subject to the procedural rules governing criminal prosecutions." *One Lot Emerald Cut Stones*, 409 U.S. at 237 (quoting *Helvering* v. *Mitchell*, 303 U.S. 391, 400 (1938)); see *Austin*, 113 S. Ct. at 2804 n.4. Finally, even if abatement proceedings were criminal in nature, that characteristic would not forbid the State from allocating the burden of proof to petitioner on her innocent owner defense. See *Martin* v. *Ohio*, 480 U.S. 228 (1987) (defendant in criminal case may be required to establish affirmative defenses such as self-defense).[14]

Petitioner's reliance (Pet. Br. 44) on this Court's "recent takings jurisprudence" is misplaced. Petitioner argues that, under *Lucas* v. *South Carolina Coastal Council*, 112 S. Ct. 2886 (1992), and *Dolan* v. *City of Tigard*, 114 S. Ct. 2309 (1994), the forfeiture of property that has been used illegally is presumptively a "taking" for which just compensation is due, and that the State must rebut that presumption by proving her culpability. The presumption, however, is

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[14] Although it is unnecessary to apply the three-factor test of *Mathews* v. *Eldridge*, 424 U.S. 319 (1976), as advocated by petitioner, Pet. Br. 39-44, that test does not assist her. It would require no extended analysis to conclude that a putative innocent owner may fairly be required to establish that he took the steps that qualify him for that status. "It is * * * entirely sensible to burden the party more likely to have information relevant to the facts * * * to demonstrate th[ose] facts * * *. Such was the rule at common law." *Concrete Pipe & Products of California, Inc.* v. *Construction Laborers Pension Trust*, 113 S. Ct. 2264, 2281 (1993).

to the contrary: "[I]t is settled that if the * * * government's actions comport, procedurally and substantively, with the terms of a lawfully enacted forfeiture statute, it may seize private property without compensating the owner." *United States* v. *One Parcel of Property with Bldgs., Appurtenances, & Improvements*, 960 F.2d 200, 210 (1st Cir. 1992); see also *Redford* v. *United States Department of Treasury*, 691 F.2d 471, 473 (10th Cir. 1982). Nothing in *Lucas* or *Dolan*, neither of which involved a forfeiture of property that had been used illegally, casts doubt on that principle.

2. *Petitioner did not allege or prove that she took all reasonable steps to prevent illegal use of the car.* In her answer to the abatement complaint and at trial, petitioner claimed only that she lacked actual knowledge that her husband would use the car illegally. See p. 3, *supra*. She did not allege or prove that she lacked reason to know that her husband would use their car illegally.[15] Nor did she allege or

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[15] Even now, petitioner does not claim that she lacked reason to know of the illegal use. Instead, she asserts that there is no "evidence in the record from which it could be inferred that Tina Bennis 'should [have] know[n]' that John Bennis was 'likely to use the [car]' in the manner the trial court found him to have used it." Pet. Br. 27. To the contrary, such an inference arguably could be drawn from the security guard's testimony that he had seen Mr. Bennis soliciting prostitutes in the neighborhood of the arrest on two prior occasions. J.A. 52-53. That testimony suggests a pattern of behavior, of which it would be more reasonable to expect a spouse to know than a single instance of behavior. In any event, the State was not required to establish that Mr. Bennis's behavior was such that petitioner had reason to know; rather, it was petitioner's burden to establish innocent owner staus. See pp. 22-25, *supra*.

prove that she took all reasonable steps to prevent such use. She is therefore in precisely the same position as the yacht company in *Calero-Toledo*. Under *Calero-Toledo*, the forfeiture of petitioner's interest in the car must be sustained.

D. The Court Should Reject The Innocent Owner Standard That Petitioner Proposes

Although petitioner appears at times to support the *Calero-Toledo* standard, see Pet. Br. 14-18, she in fact proposes a significantly more generous test for innocent ownership. Rather than adopting *Calero-Toledo*'s suggestion that the owner take "*all* reasonable steps" to prevent the unlawful use of his property, petitioner suggests that it is enough if the owner exercises reasonable care at one step: when entrusting the property to another. *Id.* at 24-27. In the alternative, she argues that under any standard of care, she could not reasonably be expected to have taken any steps to prevent the illegal use of her car, because she neither knew nor should have known about her husband's illegal conduct. *Id.* at 27-29. Neither argument is persuasive.

1. The Court in *Calero-Toledo* reaffirmed that the government may subject property to forfeiture to ensure that the owner takes steps to prevent its illegal use. 416 U.S. at 688. The Court did not suggest, however, that such steps are limited to exercising care in entrusting the property to another. In particular, there is no suggestion that the yacht owner acted negligently in entrusting the yacht to the lessees. In fact, the forfeiture rested on the discovery of marijuana on board the yacht more than a year after the lessee took possession, *id.* at 665-666.

Nor does logic support the "negligent entrustment" limitation urged by petitioner. It would make no sense, for example, to conclude that the yacht company in *Calero-Toledo* would have been constitutionally entitled to the return of its yacht if it had taken all reasonable steps to prevent unlawful conduct *before* transferring possession—even if, *after* transferring possession of the yacht, it gained knowledge that the lessor was keeping illegal drugs on board but did nothing in light of that knowledge. It is common for property owners to take steps after they transfer their property to make sure that the transferee is using the property in accordance with the conditions of the transfer. It is therefore reasonable for the forfeiture laws to encourage the owner to take reasonable steps after property has been transferred to prevent unlawful use.

Petitioner argues that she lacked the ability to control her husband's use of the car because, as a joint owner, he had the "right" to use it without her consent. Pet. Br. 27. The yacht company in *Calero-Toledo* could have made a similar argument. Although the company "included in the lease a prohibition against use of the yacht for an unlawful project," *Calero-Toledo*, 416 U.S. at 693 (Douglas, J., dissenting in part), after the lessee came into possession it presumably did not need the company's consent to use the yacht. *Calero-Toledo* illustrates that there are many situations, besides joint ownership, in which the person who causes the forfeiture does not need the owner's additional permission to use the property once it has been "entrusted" to that person.

The same reasoning defeats petitioner's assertion that "she did not in any meaningful sense have the

legal power to prevent his [illegal] use [of the car]." Pet. Br. 27. The yacht company in *Calero-Toledo* likewise presumably had limited means, as a practical matter, of preventing the illegal use of its yacht. Petitioner observes that, unlike the yacht company, she did not have "a commercial relationship" with the person who used the property illegally. *Id.* at 28. The absence of a commercial relationship, however, does not necessarily mean a lack of control. Indeed, an owner who has a personal relationship with the person who used the property illegally may be in a better position to prevent that use than an owner who has only a commercial relationship with the other person, and who relinquishes possession of the property. See, *e.g.*, *United States* v. *One 1973 Buick Riviera Automobile*, 560 F.2d 897, 901 (8th Cir. 1977) (per curiam); see also *United States* v. *One 1971 Chevrolet Corvette*, 393 F. Supp. 344, 348 (E.D. Pa. 1975).

In sum, there are no doubt differences between petitioner's relationship with Mr. Bennis in regard to their car and the yacht company's relationship with the lessee in regard to the yacht. Such differences may well be relevant in determining what steps the claimant could reasonably have taken to prevent the illegal use, since they may affect the claimant's ability to control the use of the property. But those differences do not justify a departure in this case from the "all reasonable steps" standard suggested in *Calero-Toledo*.

2. The Court should reject petitioner's argument that she could not reasonably be expected to have taken any steps to prevent Mr. Bennis's illegal use of the car. That argument is based on her assertion

that, "if one has no knowledge or reason to know of a wrongful use, then one cannot be expected to take affirmative steps to prevent that use." Pet. Br. 28.

Even if an owner lacks reason to know that a transferee will use property illegally (a circumstance that petitioner has not demonstrated), the owner can reasonably be expected in many cases to take precautions against illegal use. For example, it is reasonable to expect a landlord periodically to visit rental property in a drug-infested neighborhood whether or not he suspects any tenants of drug use. Cf. *141st Street Corp.*, *supra*. It may be reasonable to expect the owners of boats and airplanes to check the backgrounds and monitor the activities of lessors, especially in drug-smuggling areas. See *1966 Beechcraft Aircraft*, 777 F.2d at 951; *United States* v. *One Blue Lobster Vessel Named Tony, Jr.*, 639 F. Supp. 865, 872 (S.D. Fla. 1986); *United States* v. *One 1980 Stapleton Pleasure Vessel Named Threesome*, 575 F. Supp. 473, 478 (S.D. Fla. 1983). To cite a third example, financial organizations may reasonably be expected to use available computer technology to prevent money-laundering, even in the absence of individualized suspicion. See 52 Fed. Reg. 11,437-11,438 (1987).

It may be true in many cases that a spouse who lacks reason to know that the other spouse will use jointly owned property illegally cannot reasonably be expected to take any precautions. But that is not necessarily true in all cases. We submit that innocent owner claims are better resolved by the flexible standard suggested in *Calero-Toledo* than by categorical rules. A categorical rule for spouses would fail to take into account the many ways in which spouses may hold property. And a categorical

rule for joint owners would fail to take into account the variety of contexts, in addition to marriage, in which property may be jointly owned. "[W]hat one 'reasonably could be expected [to do]' to prevent criminal use of property is a standard that must be tailored to individual circumstances." *United States* v. *One 1976 Lincoln Mark IV*, 462 F. Supp. 1383, 1391 (W.D. Pa. 1979) (quoting *Calero-Toledo*, 416 U.S. at 689).

CONCLUSION

The judgment of the Michigan Supreme Court should be affirmed.

Respectfully submitted.

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In The

Supreme Court of the United States

October Term 1995

TINA B. BENNIS,

Petitioner,

v.

STATE OF MICHIGAN ex rel. WAYNE COUNTY PROSECUTOR,

Respondent.

On Writ Of Certiorari To The Michigan Supreme Court

BRIEF OF THE INSTITUTE FOR JUSTICE AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE

The Institute for Justice is a nonprofit, public interest law center committed to defending essential foundations of a free society and securing greater protection for individual liberty. Central to the mission of the Institute is strengthening the ability of individuals to control their property and advancing the belief that property rights are intricately connected to other civil rights. The Institute's brief therefore critiques civil forfeiture from a property rights perspective. It recognizes that the government's current, aggressive use of civil forfeiture laws represents one of the gravest threats to private property rights today.

The Institute for Justice has obtained the consent of the parties to the filing of this brief and letters of consent have been filed with the Clerk.

STATEMENT OF FACTS

On October 3, 1988, Detroit police officers witnessed Kathy Polarchio, a suspected prostitute, perform a sex act on John Bennis in a 1977 Pontiac. The car, co-owned by Mr. Bennis and his wife, petitioner Tina Bennis, was parked on the street in a residential neighborhood. Mr. Bennis was arrested for gross indecency. In addition, the Wayne County prosecutor filed a complaint alleging that the Pontiac was a public nuisance subject to abatement under a Michigan statute providing for the abatement of property used for the purpose of lewdness, assignation, or prostitution. Michigan Comp. Laws § 600.3801. This case was the first time in the seventy-year history of the

statute that the law had been invoked to forfeit an automobile used for the purpose of prostitution.

In the trial court, Mr. Bennis was convicted of gross indecency. Furthermore, the trial judge held that the Pontiac was a nuisance and abated the interest of Mr. Bennis and his wife. Although the Wayne County prosecutor conceded that Ms. Bennis had no knowledge of her husband's activities, her interest in the car was also forfeited.

In a 2-1 decision, the Michigan Court of Appeals reversed the decision of the trial court. In a 4-3 decision, however, the Michigan Supreme Court reversed the judgment of the Michigan Court of Appeals and upheld the forfeiture. The Michigan Supreme Court found that the statute in question did not require Tina Bennis to have prior knowledge of her husband's activities. It said that the statute "expressly obviates the requirement that an owner consent to or acquiesce in the illegal use of property." *State ex rel. Wayne Cty. Prosecutor v. Bennis*, 447 Mich. 719, 739 (1994).

Furthermore, the Court rejected Tina Bennis' constitutional claims. Bennis had argued that because she was an innocent owner of the automobile, the Due Process Clause of the Fourteenth Amendment, as well as the Takings Clause of the Fifth Amendment (as applied to the states through the Fourteenth Amendment) precluded the forfeiture of her interest in the Pontiac. The Michigan Supreme Court, however, held that under the Constitution, an innocent owner's interest may be abated so long as the vehicle was not stolen or used without the consent of the owner. One dissenting justice agreed with the Court's rejection of Bennis' constitutional claims even

though he disagreed with its interpretation of the statute. The opinion signed by the two other dissenting justices did not address Bennis' constitutional claims.

This Court has granted Tina Bennis' petition for certiorari to hear the issues of whether the Michigan statute and its application to Ms. Bennis violates the Due Process Clause of the Fourteenth Amendment and the Takings Clause of the Fifth Amendment by permitting the forfeiture of an innocent owner's property.

SUMMARY OF ARGUMENT

Private property rights form the foundation of a free society. The ability of government to forfeit the property of wholly innocent owners strikes at the core of the constitutional right to own and control property. Although civil forfeiture has roots in common law and was incorporated into early American law, it was originally viewed as an extraordinary power that arose from the necessities of enforcing admiralty and customs laws. At the federal and state levels, today's forfeiture practices far exceed the limited forfeiture power at common law.

The State of Michigan deprived Ms. Bennis of her property even though she committed no wrong and had no knowledge of the illegal use of her property. Current Michigan law provides no recourse for innocent owners. This Court should adopt as law the language in *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974) and *Austin v. United States*, 113 S.Ct. 2801 (1993) that the forfeiture of property held by truly innocent owners is unduly oppressive and violates the Due Process Clause of

the Fourteenth Amendment. Furthermore, the law should not place affirmative obligations on individuals to police the actions of third parties. Rather, the burden should be on the government to demonstrate that an owner negligently entrusted property to another in order to expose that individual to civil forfeiture.

The forfeiture of Ms. Bennis' rights in the automobile of which her husband was a co-owner also constitutes a taking of private property without just compensation. The cost of solving urban problems cannot, consistent with the Takings Clause, be thrust upon innocent property owners such as Ms. Bennis. Nor can the state escape takings liability by distorting common law nuisance principles and characterizing the single illegal use of an automobile as a "public" "nuisance."

ARGUMENT

I. THE GOVERNMENT'S ZEALOUS USE OF CIVIL FORFEITURE LAWS, AND THEIR APPLICATION TO INNOCENT PROPERTY OWNERS, SERIOUSLY UNDERMINES PRIVATE PROPERTY RIGHTS.

In reviewing the state of contemporary civil forfeiture law, Judge John Pratt of the United States Court of Appeals for the Second Circuit astutely commented that the forfeiture power generates a conflict between two fundamental principles of American law: "(1) that crime does not, or at least *should* not, pay, and (2) that property rights are a fundamental aspect of individual freedom." Pratt & Petersen, *Civil Forfeiture in the Second Circuit*, 65 St. John's L. Rev. 653, 655-56 (1991). Pratt concluded that

"[a]s civil forfeiture has been used with increasing aggressiveness, the discord between these two assumptions has increased to a point at which they seem unable to coexist." *Id.* at 656.

In its last decision addressing civil forfeiture, this Court recognized the current imbalance between governmental power and private property rights in the context of civil forfeiture. Starting from first principles and reinserting a property rights perspective to the civil forfeiture debate, this Court declared that "individual freedom finds tangible expression in property rights." *U.S. v. James Daniel Good Real Property*, 114 S.Ct. 492, 505 (1993). Noting the trampling of private property rights in the government's recent exercise of the forfeiture power, Justice Thomas stated in *Good* that property rights are "central to our heritage" and that he was "sympathetic to [the majority's] focus on the protection of [those] rights. . . ." *Id.* at 515. (Thomas, J., concurring and dissenting).

The abuse of civil forfeiture laws, and the concomitant destruction of private property rights, has been well documented in both scholarly and popular publications. Franze, *Casualties of War?: Drugs, Civil Forfeiture and the Plight of the Innocent Owner*, 70 Notre Dame L. Rev. 369 (1994); Gordon, *Prosecutors Who Seize Too Much and the Theories They Love: Money Laundering, Facilitation, and Forfeiture*, 44 Duke L. J. 744 (1995); Pilon, *Can American Asset Forfeiture Law Be Justified?*, 39 N.Y. L. Rev. 311 (1994); Hyde, *Forfeiting Our Property Rights: Is Your Property Safe From Seizure?* (1995); Reed, *American Forfeiture Law: Property Owners Meet the Prosecutor*, Cato Policy Analysis No. 179 (Sept. 29, 1992); Bullock, *Filling the Coffers with Civil Forfeitures*, Legal Times, Nov. 1, 1993; Brazil & Berry,

Tainted Cash or Easy Money?, Orlando Sentinel Trib., June 14-15, 1992; Schneider & Flaherty, *Presumed Guilty: The Law's Victims in the War on Drugs*, Pittsburgh Press, Aug. 11-Sep. 16, 1991. Moreover, the numerous horror stories of property owners caught in the web of government's enormous forfeiture power has spawned "distrust of the Government's aggressive use of broad civil forfeiture statutes." *Good*, 114 S.Ct. at 515 (Thomas, J., concurring and dissenting). Consequently, efforts are underway to reform civil forfeiture laws and afford greater procedural protection to property owners. *See* Civil Asset Forfeiture Reform Act of 1995, H.R. 1916, 104th Cong., 1st Sess. (1995) (introduced on June 22, 1995).

The issue in the instant case, however, does not concern providing greater procedural protections in order to separate the guilty from the innocent in civil forfeiture proceedings. The instant case addresses whether the property of an unquestionably innocent owner can be forfeited to the government because that property was connected to illegal activity through no fault of the owner.

Petitioner Tina Bennis claims that the forfeiture of her interest in the automobile she co-owned with her husband violates the Due Process Clause of the Fourteenth Amendment and the Takings Clause of the Fifth Amendment. This Court has recognized that property rights claims, like those of Ms. Bennis, should not be relegated "to the status of a poor relation" in comparison to other constitutional rights. *See Dolan v. City of Tigard*, 114 S.Ct. 2309, 2320 (1994). The Michigan Supreme Court ignored this Court's mandate in *Dolan* and undermined vital property rights protections.

II. ALTHOUGH CIVIL FORFEITURE IS A CENTURIES-OLD DOCTRINE, IT HAS BEEN RELEASED FROM ITS HISTORICAL MOORINGS AND IS NOW USED IN A VARIETY OF INAPPROPRIATE CONTEXTS.

The forfeiture power has roots in common law and even predates the founding of this country. Early forfeitures, however, were of limited use and application. Property owners in the twentieth century have witnessed the virtually unbounded expansion of civil forfeiture laws far beyond their common law origins. Therefore, it is important to explore the history of civil forfeiture in order to distinguish between constitutional applications of a long-established, limited governmental power and unwarranted and unconstitutional applications of its vastly expanded incarnation.

In his seminal work, *The Common Law*, Oliver Wendell Holmes traced the origin of American civil forfeiture law to the ancient law of deodands.[1] For several decades, Holmes' historical view of civil forfeiture prevailed.[2] However, recent scholarship disputes Holmes' perspective. Schecter, *Fear and Loathing and the Forfeiture Laws*, 75 Corn. L. Rev. 1151, 1154 (1990) (hereinafter "Schecter"); Maxeiner, *Bane of American Forfeiture Law – Banished at*

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[1] Deodand, derived from the Latin "deo dandum," means "to be given to God." *Pearson*, 416 U.S. at 681. It represents the oldest form of civil forfeiture and embodied the notion that the "thing" was guilty of illegal activity.

[2] This Court in *Pearson* relied in part on Holmes' history of the rise of American forfeiture law. *Id.* at 681.

Last?, 62 Corn. L. Rev. 768, 772 (1977) (hereinafter "Maxeiner"). According to this scholarship, American forfeiture law arose not from ancient deodand law, but from English admiralty procedures. Piety, *Scorched Earth: How the Expansion of Civil Forfeiture Doctrine Has Laid Waste to Due Process*, 45 U. Miami L.Rev. 911, 935-42 (1991).

Early American forfeiture statutes trace their origins to the British Navigation Acts of the mid-1600s. The Acts were passed during England's vast expansion as a maritime power. The Acts required imports and exports from England to be carried on British ships. If the Acts were violated, the ships or the cargo on board could be seized and forfeited to the crown regardless of the guilt or innocence of the owner.[3]

Using the British statutes as a model, the first United States Congress passed forfeiture statutes to aid in the collection of customs duties, which provided 80-90% of the finances for the federal government during that time. Act of August 4, 1790, 1 Stat. 145; Act of July 31, 1789, 1 Stat. 29; Maxeiner, 62 Corn. L. Rev. at 782 n.86. Civil or "*in rem*" forfeitures were introduced in American law through these early customs statutes. The forfeiture power was challenged and upheld in *The Palmyra*, 25 U.S. (12 Wheat.) 1 (1827). The owner of a shipping vessel asserted that an *in rem* forfeiture could not occur unless

[3] Although the Acts were worded in absolute terms, juries nevertheless acquitted shipowners if it could be shown that they had taken all reasonable steps to ensure that the ship not be used for illegal purposes. Maxeiner, 62 Corn. L. Rev. at 774.

he was convicted of criminal wrongdoing. However, Justice Story held that the "proceeding *in rem* stands independent of, and wholly unaffected by any criminal proceeding *in personam*." *Id.* at 15. Consequently, "[t]he thing is here primarily considered as the offender, or rather the offence is primarily attached to the thing. . . ." *Id.* at 14. Despite the sweep of the *Palmyra* language, it is clear from a careful reading of the case that the holding was plainly limited to *in rem* forfeitures under the admiralty jurisdiction.

This Court clarified the government's forfeiture power in the landmark case, *United States v. Brig Malek Adhel*, 43 U.S. (2 How.) 210 (1844). The case presented the question of whether an innocent owner of a ship could have his property forfeited due to the illegal and unauthorized acts of the master. Justice Story, once again writing for the majority, upheld the forfeiture under the same rationale developed in *The Palmyra*.

The most important aspect of these early forfeiture cases is the justification provided for the expansion of civil forfeiture to innocent property owners. This Court held that the forfeitures were closely tied to the functional necessities of enforcing admiralty, piracy, and customs laws. *In rem* forfeiture permitted courts to obtain jurisdiction over property when it was virtually impossible to obtain *in personam* jurisdiction over the property owners. Therefore, the government could ensure that customs laws were enforced even if the owner of the ship or the cargo was outside the court's jurisdiction. Justice Story wrote that the "vessel which commits the aggression is treated as the offender, as the guilty instrument or

thing to which the forfeiture attaches, without any reference whatsoever to the character or conduct of the owner." *Brig Malek Adhel*, 43 U.S. at 233. However, Story justified such forfeitures "from the necessity of the case, as the only adequate means of suppressing the offence or wrong, or insuring an indemnity to the injured party." *Id.* (emphasis added).

Civil forfeitures were released from their historical moorings during the Civil War. The Confiscation Acts allowed the Union to seize and forfeit the rebels' Northern property and the property of those who aided the Confederacy. Act of July 17, 1862, 12 Stat. 589; Act of August 6, 1861, 12 Stat. 319. In 1863, the Supreme Court of Kentucky declared the Acts unconstitutional and presciently observed that "[t]hese in rem proceedings may today be the engines of punishment to the rebels, but, in the future, they may be the instruments of oppression, injustice, and tyranny . . . ." *Norris v. Doniphan*, 61 Ky. (4 Met.) 385, 426 (1863).

Numerous challenges to these Acts were mounted and eventually this Court agreed to address the constitutional issues. In 1871, the Acts were upheld against Fifth and Sixth Amendment challenges. *Miller v. United States*, 78 U.S. (11 Wall.) 268, 305 (1871). Upholding the Confiscation Acts in the face of constitutional attack worked "a revolution in forfeiture law that persists to this day -- use of the *in rem* action without constitutional limitation. It is unlikely that such a change would have occurred had it not been for the passions raised by the Civil War." Mazeiner, 62 Conn. L. Rev. at 787 (1977).

After the Confiscation Act cases, expansion of civil forfeiture law continued. Unlike their common law predecessors, twentieth century civil forfeitures are part of larger governmental efforts to eliminate undesirable social behavior, such as alcohol[4] and drug use.[5] Released from its functional application as a means of enforcing admiralty and customs laws, the forfeiture power has become one of the most powerful weapons in the government's arsenal to eliminate vice.

The instant case is a good example of the differences between the extraordinary common law remedy of civil forfeiture and modern forfeiture applications. As discussed previously, early civil *in rem* forfeitures arose from necessity. The government needed a means of enforcing revenue and customs laws even if they could not obtain *in personam* jurisdiction over an owner. *See Good*, 114 S.Ct. at 504 (noting broader deference afforded government in collecting debts or revenues). Otherwise, the state and private litigants would often be left without a remedy. Significantly, the forfeiture of a yacht -- the

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[4] Included in most efforts to eliminate alcohol were attempts to curb what were considered the secondary effects of alcohol consumption: gambling, prostitution, and other forms of vice.

[5] It is interesting to note that between the end of Prohibition and the start of the modern Drug War, this Court waived in the application of forfeiture to innocent owners at least to a certain extent. *See United States v. One 1936 Model Ford V-8 Deluxe Coach*, 307 U.S. 219, 226 (1939) ("The forfeiture acts . . . were intended for the protection of the revenues, not to punish without fault.").

property at issue in this Court's decision upholding civil forfeiture, *Calero-Toledo* – is within the traditional admiralty domain of *in rem* forfeiture.

None of the traditional justifications for civil forfeiture apply in the instant case. If Ms. Bennis were guilty of any wrongdoing or negligently entrusted her property to the care of another, the government could easily obtain *in personam* jurisdiction over her for the issuance of an injunction or a criminal penalty. Furthermore, the state was not enforcing revenue laws when it forfeited the Bennis automobile. It is more likely that the State of Michigan, like many other jurisdictions today, was using the civil forfeiture power to *generate* unappropriated revenues for the state through the expropriation of private property.*

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* In its last decision addressing the general constitutionality of civil forfeiture, this Court held that forfeiture did not violate the Due Process Clause of the Fourteenth Amendment due in part to the assumption that forfeitures were "not initiated by self-interested private parties." *Calero-Toledo*, 416 U.S. at 679. Instead, it was assumed that forfeitures are carried out by government officials acting in the public, as opposed to self, interest.

This Court's assumption concerning government officials ignores crucial incentives that influence all government decisionmakers. This assumption is especially misplaced in civil forfeiture where law enforcement agencies keep a percentage of forfeited assets and proceeds. Individuals, whether they act in the public or private spheres, tend to promote their own self-interest. Buchanan, *Constitutional Economics* 37-38 (1991); Boudreaux & Pritchard, *Civil Forfeiture and the War on Drugs: Lessons from Economics and History* (forthcoming); *see also The Federalist* No. 51 (Madison). Given this natural orientation, government officials need to be bound by what Madison described as

Traditionally, the forfeiture power was narrowly limited in ways that prevented government from violating individual rights. As the forfeiture power has strayed from its historical and common law moorings, governments now use this power without built-in safeguards and in violation of the Constitution.

"auxiliary precautions," or the constitutional restraints designed by the Framers to protect individuals from unwarranted or abusive government actions. *Id*.

When public officials and agencies have a direct financial stake in the outcome of their actions, this Court has subjected such actions to particularly close scrutiny. *Tumey v. Ohio*, 273 U.S. 510 (1927) (overturning fine where mayor, who also sat as judge, personally received share of the fines); *Ward v. Village of Monroeville*, 409 U.S. 57 (1972) (due process violated where substantial portion of town's income came from fines imposed by town mayor sitting as judge); *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 250 (1980) (constitutional concerns raised when government official's "judgment will be distorted by the prospect of institutional gain as a result of zealous enforcement efforts"); *Good*, 114 S.Ct. at 502 (constitutional considerations arise where "the Government has a direct pecuniary interest in the outcome of the proceeding"). The current institutional arrangement and incentive structure behind civil forfeiture demand that the property rights of innocent owners be protected. Accordingly, this Court should discard the *Calero-Toledo* holding that civil forfeiture is not initiated by self-interested parties and instead consider the constitutional claims of innocent property owners, such as petitioner in the instant case.

III. THE APPLICATION OF CIVIL FORFEITURE TO INNOCENT PROPERTY OWNERS VIOLATES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT AND THE TAKINGS CLAUSE OF THE FIFTH AMENDMENT.

This Court in *Pearson* recognized, albeit in dicta, two instances where the application of civil forfeiture to innocent owners may raise serious constitutional concerns: forfeitures where the wrongdoer obtained the property without the consent of the owner and those situations where an innocent owner demonstrated not only that he was unaware of the property's illegal use, but that he had done all that could reasonably be expected to prevent its illegal use. *Id* at 689. In those situations, it would be difficult to conclude that the forfeiture was not "unduly oppressive."[7] *Id*. at 690. The instant case squarely presents one of the situations alluded to in *Pearson* – the case of the entirely innocent owner. This Court should adopt as law, with the modifications outlined below, the *Pearson* dicta. As the following sections set forth, the nuisance abatement statute's lack of any "innocent owner" exception to forfeiture violates both the Due Process Clause of the Fourteenth Amendment and the Takings Clause of the Fifth Amendment to the United States Constitution.

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[7] Likewise, this Court in *Austin*, 113 S.Ct. at 2809, reiterated the *Pearson* dicta by declaring that forfeitures have never been applied "when the owner had done all that reasonably could be expected to prevent the unlawful use of his property."

A. Unless An Owner Negligently Entrusts His Property To Another, The Forfeiture of An Innocent Owner's Property Is Unduly Oppressive And Violates The Due Process Clause Of The Fourteenth Amendment.

The Due Process Clause protects individuals from malicious, arbitrary, and irrational deprivations of property. *Moore v. City of East Cleveland*, 431 U.S. 494 (1977); *Eide v. Sarasota*, 908 F.2d 716 (11th Cir. 1990); *Sinaloa Lake Owners Ass'n v. City of Simi Valley*, 882 F.2d 1398 (9th Cir. 1989), *cert. denied sub nom. Doody v. Sinaloa Lake Owners Ass'n*, 110 S.Ct. 1317 (1990). Not providing innocent owners any relief whatsoever from the application of civil forfeiture laws results in arbitrary and "unduly oppressive" forfeitures in violation of due process guarantees. *See Pearson*, 416 U.S. at 689. If there were ever an example of an "unduly oppressive" forfeiture, it is the forfeiture of Ms. Bennis' interest in the automobile of which her husband was a co-owner. Ms. Bennis is, unquestionably, an innocent owner; she had absolutely no knowledge of, nor did she consent to, her husband's illegal use of their property. Current Michigan law, however, provides no recourse for innocent owners such as Ms. Bennis.

Because the *Pearson* language setting forth what would constitute an "unduly oppressive" forfeiture was dicta, several courts, including the Michigan Supreme Court, have refused to provide any relief to innocent owners. At a minimum, this Court should adopt as law the *Pearson* dicta in order to prevent "unduly" oppressive forfeitures such as the forfeiture of Ms. Bennis' automobile.

Even when courts have applied the *Pearson* dicta, however, the lack of clarity concerning what constitutes reasonable steps a property owner must take to prevent the illegal use of his property has led to particularly harsh applications of the forfeiture power. *See, e.g., U.S. v. One 1957 Rockwell Aero Commander*, 671 F.2d 414 (10th Cir. 1982) (upholding forfeiture of an aircraft for non-compliance with Customs Service regulations even though aircraft was stolen and owner was unaware of its activities); *U.S. v. $6,700*, 615 F.2d 1 (1st Cir. 1980) (affirming forfeiture of cash brought into United States illegally even though the cash was embezzled from the owner's estate); *U.S. v. One Mercedes Benz 380 SEL*, 604 F. Supp. 1307 (S.D.N.Y. 1984) (upholding forfeiture of an automobile used in drug transaction even though car had been loaned to third person in whose care owner had left the car and owner had no knowledge of drug activity). As these cases and many others demonstrate, a strict interpretation of the *Pearson* suggestion that a private party must take "all" reasonable precautions against illegal use places both onerous and vague duties on private parties to pro-actively police the actions of others.

Such a burden is especially troubling in the context of family relationships, where the government has traditionally not intervened to impose obligations on family members to probe into the activities of one another. Indeed, it would be difficult to imagine any steps Ms. Bennis could have reasonably taken to prevent the illegal use of her property when she had no previous knowledge or reason to believe that her property was going to be used illicitly. What precautions should a woman take before letting her heretofore law-abiding husband use the

family car? Even outside the special context of a marriage, if a property owner has no knowledge or reason to believe that someone will engage in illegal activity with particular property, then why would one take steps to prevent its illegal use?

Other innocent owners, such as mortgagees, purchasers, lessors, and landlords also have to walk a very fine line. They subject themselves, on the one hand, to possible physical harm or legal action (by prying too closely into the affairs of others) or, on the other hand, the possible forfeiture of valuable property (by not prying closely enough). Moreover, the imposition of affirmative law enforcement obligations on private parties runs counter to traditional Anglo-American criminal law doctrine that has refused to place such duties on individuals. Hart, *Variety of Responsibility*, 83 Law Q. Rev. 346, 354-55 (1967). Innocent property owners "should not forfeit their property for failing to act as a private police force which searches every person who borrows, leases, or is invited into a vehicle." Schecter, 75 Corn. L. Rev. at 1180.

In order to prevent the application of civil forfeiture to unquestionably innocent owners, this Court should adopt the *Pearson* dicta as a constitutional rule. However, the *Pearson* rule should be clarified and strengthened by adopting a rule of negligent entrustment when forfeiture is used against innocent owners.[8] Drawn from traditional

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[8] Indeed, this Court already has suggested such a rule. Similar to the negligent entrustment rule for civil forfeiture suggested in the instant case, the *Austin* decision stated that holding the owner "accountable for the wrongs of others to whom he entrusts his property" rests "on the notion that the

common law tort principles, the negligent entrustment doctrine holds:

> It is negligence to permit a third party to use a thing . . . which is under the control of the actor, if the actor knows or should know that such person intends or is likely to use the thing . . . in such a manner as to create an unreasonable risk of harm to others.

Restatement of Torts (2d) § 308 (1965). As petitioner's brief more substantially sets forth, the substitution of the words "in such a manner as to create an unreasonable risk of harm to others" with the words "in a manner proscribed by law" establishes a reasonable rule of care when property owners allow their property to be used by others.

The negligent entrustment doctrine would provide clear guidance to lower courts where, as in the instant case, forfeiture statutes provide no relief for innocent owners. Under this doctrine, Ms. Bennis clearly did not negligently entrust her property to her husband. There is no evidence that Ms. Bennis "should have known" that her car would be used by her husband for illegal purposes. She never knew her husband to engage in such conduct in the past nor did she have any reason to suspect he was going to engage in such conduct that night. Furthermore, since Mr. Bennis had equal access and "control" over the vehicle and did not have to seek

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owner has been negligent in allowing his property to be misused and that he is properly punished for the negligence." 113 S.Ct. at 2809.

his wife's consent to use the car, Ms. Bennis could not have taken reasonable steps to prevent its misuse. Accordingly, the state has not met its burden of justifying the forfeiture of Ms. Bennis' property either under the *Pearson* dicta language or the negligent entrustment doctrine.[9]

Without an innocent owner exception, the Michigan nuisance abatement statute deprives individuals of property without due process of law in violation of the Fourteenth Amendment. Recognizing the inherent unfairness of a rule which deprived individuals of property without regard to wrongdoing or negligence, the Supreme Court of North Carolina declared that

> a law which requires such a person at all times to know what is being done with his property, in other words, by the act of sale or lease to make a public guaranty that it shall at all times be used for a legitimate purpose, is opposed to common experience and the necessity of commercial and social intercourse, and is so obviously unjust as to be arbitrary.

Sinclair v. Croom, 8 S.E.2d 834, 836 (N.C. 1940). Furthermore, the *Pearson* suggestion that an owner must take "all" reasonable precautions imposes a far too onerous

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[9] The *Pearson* dicta implies that property owners have the burden of proving that they took all reasonable steps to prevent the illegal use of their property. As petitioner's brief more substantially sets forth, the negligent entrustment rule would place the burden on the government to demonstrate that an owner negligently allowed another to use his property for illegal purposes.

burden on property owners and provides extremely narrow relief. The negligent entrustment doctrine provides a workable rule when innocent owners are swept up in civil forfeiture proceedings.

B. Forcing Ms. Bennis To Bear The Costs of Addressing Urban Problems When She Is Entirely Innocent Of Wrongdoing Violates The Takings Clause Of The Fifth Amendment.

In addition to violating due process guarantees, the application of Michigan's nuisance abatement statute to innocent property owners such as Ms. Bennis constitutes a taking of private property without just compensation in violation of the Fifth and Fourteenth Amendments to the United States Constitution. While this Court held that the forfeiture in *Pearson* did not constitute a taking, it left open the question, later reiterated in *Austin*, of whether "forfeiture of a truly innocent owner's property" would comport with the Constitution. *Austin*, 113 S.Ct. at 2809. In the instant case, it is undisputed that Ms. Bennis acted neither criminally nor negligently with her property. In other words, she is a "truly innocent owner[]." *Id*. However, the Michigan nuisance abatement statute offers no relief or exception for innocent property owners.

The Fifth Amendment to the United States Constitution states that "private property shall not be taken for public use without just compensation." Central to the requirements of the Takings Clause is this Court's holding that private parties cannot be forced to bear costs that should in fairness and justice be borne by the public. *Armstrong v. United States*, 364 U.S. 40, 49 (1960); *see also*

Nollan v. California Coastal Commission, 483 U.S. 825, 837 (1987); Epstein, *Takings: Private Property and the Law of Eminent Domain* 42-44, 182-94 (1985). Significantly, the plaintiff in *Armstrong*, like Ms. Bennis, was an innocent owner. Armstrong was a subcontractor who furnished material to a shipbuilding company. He attached valid liens to the products he provided. The shipbuilding company had a contract with the government. When the company went bankrupt, the government demanded and secured the ships under its contract. The government prevented Armstrong, however, from foreclosing on his valid liens.

This Court held in *Armstrong* that while the government was certainly entitled to foreclose and destroy liens, it had to compensate the lienholders. Similarly, if the government chooses to forfeit the Bennis automobile to further the public purpose of law enforcement and "cleaning up" Detroit, then it must compensate innocent parties, like Ms. Bennis, who hold an interest in the property. As discussed in Part A of this section, the forfeiture of Ms. Bennis' interest serves no remedial or punitive purpose to take it outside the protection of the Fifth Amendment's Takings Clause. Furthermore, Ms. Bennis was not the "intended beneficiary" of the government action in this case. *See National Board of Y.M.C.A. v. United States*, 395 U.S. 85 (1969) (no taking if government destroys property when it acts primarily in defense of plaintiffs' property rather than primarily for public good). Rather, the forfeiture of Ms. Bennis' property rights is a taking of property for a public purpose without the payment of just compensation. As an unquestionably innocent third party, Ms. Bennis should not bear the

financial burden of law enforcement activities designed to address urban problems.

The destruction of an innocent owner's interest has been considered a violation of the Takings Clause in other contexts. For instance, in *In re Metmor Financial*, 819 F.2d 446, 450 (4th Cir. 1987), the United States Court of Appeals for the Fourth Circuit held that the forfeiture of property could not change the nature of an innocent mortgagee's rights. The court held that "if viewed from the perspective of a Fifth Amendment taking, for which [an innocent owner] is entitled to 'just compensation' – typically defined as 'fair market value of the property on the date it is appropriated' – the government must pay [the innocent owner] the fair market value of the mortgage. . . . " *Id.* at 450; *see also Shelden v. United States*, 7 F.3d 1022 (Fed. Cir. 1993); *Monroe Savings Bank v. Castalano*, 733 F. Supp. 595 (W.D.N.Y. 1990). The court further held that "the government can succeed to no greater interest in the property than that which belonged to the wrongdoer whose actions have justified the seizure." *Id.* at 448-49. Likewise, the government in the instant case should not be allowed to deprive innocent third parties, such as Ms. Bennis, of any legitimate interests in the property.

Nor can the government escape the requirements of the Takings Clause merely by characterizing the forfeiture as an abatement of a nuisance. Only a single act of prostitution occurred in the Bennis car. A majority of the Michigan Supreme Court, however, ruled that the car was transformed into a nuisance because it occurred in a neighborhood allegedly known as an area frequented by those soliciting prostitutes.

Chief Justice Cavanaugh's dissent clearly demonstrates how the majority twisted the traditional rights and responsibilities of property owners in an effort to address an urban problem. *Bennis*, 44 Mich. at 744-51. At common law, property could, under specific and limited circumstances, be declared a nuisance. 58 Am.Jur.2d, Nuisances, § 77. However, nuisance has always involved "continuity or recurrence" of an offending practice. *People ex rel. Arcara v. Cloud Books, Inc.*, 480 N.E.2d 1089, 1095 (N.Y. 1985), *rev'd on other grounds*, 478 U.S. 697 (1986) (nuisance is "a consistent pattern of conduct sufficient to prove that the premises are being employed for a proscribed use"). Under the common law, a "place" becomes a nuisance when it has "absorbed and taken the character of the acts committed." *State ex rel. Carrol v. Gatter*, 260 P.2d 360, 364 (Wash. 1953).

The Michigan Supreme Court deviated widely from the common law definition of a nuisance when it attempted to demonstrate the continuity of supposed nuisance-like acts in a particular neighborhood or "place" where prostitution occurs. However, it was the automobile and not the neighborhood that was forfeited. Under the Michigan Supreme Court's logic, property rights are determined by the area in which property happens to be located. If a property owner is unfortunate enough to have property located in an area where "lewdness" occurs on a regular basis, then his rights are significantly diminished under the Michigan court's novel and unprecedented approach to property rights. Indeed, under this view of property rights, a respectable hotel that happens to be located in a neighborhood that has "declined" could be forfeited if a single act of prostitution

occurred in one of the rooms without the knowledge of the owner. That same act of prostitution could occur in a more upscale neighborhood, however, and the hotel (or automobile) could not be forfeited under the Michigan Supreme Court's rule.

These common law understandings of nuisance – and the Michigan Supreme Court's departure from them – are significant in light of this Court's decision in *Lucas v. South Carolina Coastal Council*, 112 S.Ct. 2886 (1992). *Lucas* recognized that a taking cannot be excused merely by a legislature or a court attaching the nuisance label to the government action:

> Any limitation [on property] so severe cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon . . . ownership. A law or decree with such an effect must, in other words, do no more than duplicate the result that could have been achieved in the courts – by adjacent landowners (or other uniquely affected persons) under the State's law of private nuisance, or by the State under its complimentary power to abate nuisances that affect the public generally, or otherwise.

Lucas, 112 S.Ct. at 2900.

Under *Lucas*, a nuisance must be justified on common law doctrines and principles rather than self-serving legislation or novel judicial determinations of what constitutes a nuisance. Use of the nuisance abatement statute to forfeit Ms. Bennis' interest in the automobile would be extremely difficult to justify under common law nuisance

principles. A private party could not successfully file a nuisance action against the automobile based upon a single act of prostitution (although a private party could probably successfully file such an action against a house of prostitution that was causing significant and long-standing problems in the neighborhood and interfering with the owner's use of his property). Moreover, the automobile does not rise to the level of a public nuisance at common law, which was generally a criminal action to abate property uses that were injurious to the public at large. *See* Lee & Lindahl, *Modern Tort Law* § 35.02 (1990) ("[A] public nuisance . . . is an invasion of a right common to members of the public generally. . . . It is an offense against the state. . . . It is a crime.").

The Michigan Supreme Court has undermined property rights and traditional property law principles in its attempt to address vexing urban problems. Such problems cannot be ameliorated, however, at the expense of private property rights. Ms. Bennis had absolutely no knowledge of, nor did she consent to, the illicit use of the automobile she co-owned with her husband. She should not be punished for the behavior of her husband and, even more importantly, the behavior of other men in a particular neighborhood. The cost of cleaning up Detroit cannot be thrust upon an individual who merely wishes to retain property she rightfully owns.

CONCLUSION

For all the foregoing reasons, *amicus curiae* Institute for Justice respectfully requests that this honorable Court reverse the opinion below.

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IN THE

Supreme Court Of The United States

OCTOBER TERM, 1994

TINA B. BENNIS,

Petitioner,

v.

STATE OF MICHIGAN ex rel.
WAYNE COUNTY PROSECUTOR,

Respondent.

On Writ of Certiorari to
the Michigan Supreme Court

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QUESTION PRESENTED FOR REVIEW

1. Whether a wife's interest in a vehicle which she jointly owned with her husband may, consistent with the federal constitution, be abated by a court pursuant to a Michigan abatement statute, where the record established that the wife had no knowledge that the vehicle would be used by her husband in violation of the abatement statute.

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No. 94-8729

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1994

TINA B. BENNIS,

Petitioner,

v.

STATE OF MICHIGAN ex rel.
WAYNE COUNTY PROSECUTOR,

Respondent.

On Writ of Certiorari to
the Michigan Supreme Court

BRIEF AMICUS CURIAE OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONER

INTEREST OF THE AMICUS[1]

The National Association of Criminal Defense Lawyers ("NACDL") is a District of Columbia non-profit corporation with a membership of more than 8,800 attorneys and 28,000 affiliate members, including representatives from every state. The American Bar Association recognizes NACDL as an affiliated organization and awards it full representation in its House of Delegates.

NACDL was founded over thirty-five years ago to promote study and research in the field of criminal defense law; to

[1] All parties have consented to the filing of this brief pursuant to Rule 37.3 of the Rules of this Court.

disseminate and to advance knowledge of the law in the field of criminal practice; and to encourage the integrity, independence and expertise of defense lawyers. Among NACDL's stated objectives is the promotion of the proper administration of criminal justice.

NACDL has long been troubled by the expanding use of civil forfeiture proceedings in our criminal justice system. We have deep concerns about the fairness of some of these laws and the aggressive way they are being used by state and federal prosecutors to inflict punishment and to deprive individuals of significant property interests, often without any of the constitutional and procedural protections generally accorded to either criminal or civil defendants. Like the Second Circuit Court of Appeals, we too "continue to be enormously troubled by the government's increasing and virtually unchecked use of the civil forfeiture statutes and the disregard for due process that is buried in those statutes." *United States v. All Assets of Statewide Auto Parts, Inc., etc.*, 971 F.2d 896, 905 (2nd Cir. 1992). *See also United States v. James Daniel Good Real Property*, 510 U.S. ___, 126 L.Ed.2d 490, 521, n.1., 113 S.Ct. 515, n.1 (1993) (Thomas, J., concurring and dissenting).

In its past three terms, this Court has accepted review of five forfeiture cases.[2] In its decisions, the Court has endeavored to establish legal safeguards to appropriately restrain the government's increasingly aggressive use and abuse of the forfeiture weapon. This case provides the Court with an opportunity to decide a question which it has long reserved: "whether it would comport with due process to forfeit the property of a truly

[2] *Republic National Bank v. United States*, 506 U.S. ___, 121 L.Ed.2d 474, 113 S.Ct. 554 (1992); *United States v. A Parcel of Land (92 Buena Vista Avenue)*, 507 U.S. ___, 122 L.Ed.2d 469, 113 S.Ct. 1126 (1993); *Alexander v. United States*, 509 U.S. ___, 125 L.Ed.2d 441, 113 S.Ct. 2766 (1993); *Austin v. United States*, 509 U.S. ___, 125 L.Ed.2d 488, 113 S.Ct. 2801 (1993); and *United States v. James Daniel Good Real Property*, 510 U.S. ___, 126 L.Ed.2d 490, 114 S.Ct. 492 (1993).

innocent owner." *Austin v. United States*, 509 U.S. ___, ___, 125 L.Ed.2d 488, 502, n.10, 113 S.Ct. 2801, 2809, n.10 (1993). Thus, NACDL has a vital interest in the outcome of this case, and urges the Court to reverse the decision below.

SUMMARY OF ARGUMENT

Throughout this nation's history, the importance of private property as a "concomitant to liberty" has been widely recognized. This Court's recent decisions have served to clarify and strengthen these property rights which we hold so dear in a free society. However, a large threat looms against these rights in the form of modern day forfeiture statutes driven by strict adherence to ancient principles.

For reasons based not upon considerations of fundamental rights, but upon purely economic or political expediency, forfeiture law has intruded on the rights of innocent owners. Although two seemingly independent lines of forfeiture law have persisted since the founding of the Republic, modern forfeiture jurisprudence tends to follow the line of cases which blindly accepts the notion that it is legally justifiable to forfeit private property, regardless of the culpability of the owner, based upon a legal fiction that has long since out-lived its usefulness. Reviewing the history of forfeiture laws, it is clear that forfeiture jurisprudence can no longer justify its blind adherence to the past, and that based on contemporary notions of justice and fair-play, the forfeiture of a truly innocent owner's property cannot comport with due process of law or the Takings Clause.

ARGUMENT

I. THE PROTECTION OF PRIVATE PROPERTY RIGHTS IS CENTRAL TO OUR HERITAGE.

Throughout the history of western democratic societies, the importance of private property as a "concomitant to liberty" has

been widely recognized. *United States v. $12,390.00*, 956 F.2d 801, 810 (8th Cir. 1992) (Beam, J., dissenting in part). "The Fifth Amendment embodies the Lockean belief that liberty and the right to possess property are an interwoven whole; neither life, liberty, nor property can be arbitrarily or capriciously denied us by government." *Id.* Indeed, this Court has recognized that "a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other." *Lynch v. Household Finance Corp.*, 405 U.S. 538, 552, 31 L.Ed.2d 424, 92 S.Ct. 1113 (1972); *See* John Locke, THE SECOND TREATISE ON CIVIL GOVERNMENT, ¶ 123-42. Likewise, as recently observed by this Court, "[I]ndividual freedom finds tangible expression in property rights." *United States v. James Daniel Good Real Property*, 510 U.S. ___, ___, 126 L.Ed.2d 490, 508, 114 S.Ct. 492, 505 (1993); 510 U.S. at ___, 126 L.Ed.2d at 521, 114 S.Ct. at 515 (Thomas, J. concurring and dissenting).

The nature and quality of a citizen's freedom and security relates directly to his ability to own property and to be secure from governmental intrusion therein. "[I]n a free government almost all other rights would become worthless if the government possessed power over the private fortune of every citizen." *Chicago, Burlington & Quincy R.R. v. Chicago*, 166 U.S. 226, 236, 41 L.Ed. 979, 17 S.Ct. 581 (1897); *see also* Charles A. Reich, *The New Property*, 73 YALE L.J. 733, 771-74 (1964) (asserting that a person's freedom and security depend on his ability to protect his property from irrational government interference); Leonard W. Levy, ORIGINAL INTENT AND THE FRAMERS' CONSTITUTION, 276-77 (1988).

Despite the high regard generally bestowed upon property rights in Anglo-American jurisprudence, the use of civil forfeiture proceedings to confiscate private property has had an oppressive history in both England and America, virtually as long as organized self-government. *See, e.g., Laws of Ine*, c. 6

(*circa* 688-695), collected in 1 F. Lieberman, DIE GESETZE DER ANGELSACHSEN 91 (1903). *See generally*, 2 F. Pollack & F. Maitland, THE HISTORY OF ENGLISH LAW, 462-511 (2d ed. 1911); J. Maxeiner, *Bane Of American Forfeiture Law —Banished At Last?*, 62 CORNELL L.R. 768, 770 (1977). Much of this history exhibits a decided indifference, at times even a disdain, for private property rights.

The disrespect for the rights of property owners in forfeiture statutes and court decisions is often concentrated in the legal fiction often referred to as the "personification" doctrine — the notion that an inanimate object may be guilty of an offense and punished therefor without regard to the culpability of those owning an interest in the property. The history of forfeiture demonstrates that this legal fiction is little more than a rationalization for judicial doctrines based not on consideration of fundamental rights, but on policy considerations, usually driven by economic or political factors. This fiction has no sound basis in our legal system and cannot be reconciled with the principles of freedom and security so valued by a free society. *See Boyd v. United States*, 116 U.S. 616, 29 L.Ed.2d 746, 6 S.Ct. 524 (1886).

> [W]e cannot see the force of this distinction [between an action in rem against the property and an action against the owner]; nor can we assent to the proposition that the proceeding is not, in effect, a proceeding against the owner of the property, as well as against the goods; for it is his breach of the laws which has to be proved to establish the forfeiture, and it is his property which is to be forfeited.

Id., 116 U.S. at 637.

It is through the use of this legal fiction that "the innocence of the owner of property subject to forfeiture has almost uniformly been rejected as a defense." *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 683, 40 L.Ed.2d 452, 94 S.Ct. 2080 (1974). However, the Court also observed in that same

case that "it would be difficult to reject the constitutional claim of an owner . . . who proved not only that he was uninvolved in and unaware of the wrongful activity, but also that he had done all that reasonably could be expected to prevent the proscribed use of his property, for in that circumstance it would be difficult to conclude that forfeiture served legitimate purposes and was not unduly oppressive. *Cf. Armstrong v. United States*, 364 U.S. 40, 49, 4 L.Ed.2d 1554, 80 S.Ct. 1563 (1960)." *Id.*, 416 U.S. at 689-90.

Indeed, just three years earlier, the Court noted that although its past decisions had recognized that "centuries of history support the . . . claim that forfeiture statutes . . . have an extraordinarily broad scope," *United States v. United States Coin and Currency*, 401 U.S. 715, 719, 28 L.Ed.2d 434, 91 S.Ct. 1041 (1971), before the Court would order a forfeiture, it

> would have to be satisfied that a forfeiture statute, with such a broad sweep, did not raise serious constitutional questions under that portion of the Fifth Amendment which commands that no person shall be "deprived of . . . property without due process of law; nor shall private property be taken for public use, without just compensation." Even Blackstone, who is not known as a biting critic of the English legal tradition, condemned the seizure of the property of the innocent as based upon a "superstition" inherited from the "blind days" of feudalism. And this Court has recognized the difficulty of reconciling the broad scope of traditional forfeiture doctrine with the requirements of the Fifth Amendment. *See, e.g., Goldsmith v. Grant Co. v. United States* [254 U.S. 505, 65 L.Ed. 376, 41 S.Ct. 189 (1921)].

Id., at 720-21.

In *Austin v. United States*, 509 U.S. ___, 125 L.Ed.2d 488, 113 S.Ct. 2801 (1993), this Court reaffirmed that "[T]he more

recent cases have expressly reserved the question whether the fiction could be employed to forfeit the property of a truly innocent owner." *Id.*, 125 L.Ed.2d 502, 502 n.10, 113 S.Ct. 2809, 2809 n.10; 125 L.Ed.2d at 508, 113 S.Ct. at 2814 (Scalia, J., concurring); 125 L.Ed.2d at 510, 113 S.Ct. at 2816 (Kennedy, J., concurring). Because the forfeiture statute at issue in *Austin* exempted "innocent owners" from forfeiture, the Court had "no occasion to decide in this case whether it would comport with due process to forfeit the property of a truly innocent owner." *Id.*, 125 L.Ed.2d 502, n.10, 113 S.Ct. 2809, n.10.

This case presents the Court with the opportunity to finally resolve this question. Unlike the statute before the Court in *Austin*, the Michigan abatement statute under which Petitioner's interest in her automobile was abated does not provide for an innocent owner defense. Indeed, it expressly provides that a property owner's knowledge or consent is not required to be shown under the statute.[3] Moreover, in the case below, the

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[3] The proceeding in the Michigan courts against Petitioner's interest her automobile is correctly viewed as a forfeiture action, not merely as a proceeding to abate a nuisance. Forfeiture has been defined as a "default, fine or penalty." J. Kersey, A New English Dictionary (1702), cited by the Court in *Austin, supra*, 113 S.Ct. at 2808, n.7. The State of Michigan certainly sought to impose a fine or penalty upon Petitioner in this case by taking her interest in her car based upon her husband's alleged misconduct.

Regardless of what the Michigan courts called it, the result was a forfeiture or penalty imposed on Petitioner. As this Court recently noted in *Austin*:

> we have recognized that the forfeiture of contraband itself may be characterized as remedial because it removes dangerous or illegal items from society. *See United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 364, 79 L.Ed.2d 361, 104 S.Ct. 1099 (1984). The Court, however, previously has rejected government's attempt to extend that reasoning to conveyances used to transport illegal liquor. *See One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 699, 14 L.Ed.2d 170, 85 S.Ct. 1246 (1965). In that case it noted: "There is nothing even remotely criminal in possessing an automobile." *Ibid.*

Michigan Supreme Court assumed, for purposes of its constitutional analysis, that based on the record below, Petitioner "did not have knowledge of or consent to the misuse of [Petitioner's] vehicle, of which she was a co-owner." *Michigan ex rel. Wayne County Prosecutor v. Bennis*, 447 Mich. 719, 740, 527 N.W.2d 483, 493 (1994).

In *Austin*, Justice Kennedy observed that although the history of forfeiture laws might not be determinative of the "constitutional question of whether forfeiture is permitted when the owner has committed no wrong of any sort, intentional or negligent," "it would have an important bearing on the outcome." *Austin*, *supra*, 125 L.Ed.2d at 510, 113 S.Ct. at 2816. Accordingly, we begin our analysis with a review of the history of forfeiture laws.

II. THREE TYPES OF FORFEITURES WERE RECOGNIZED UNDER EARLY ENGLISH LAW.

The history of forfeiture reveals a sort of dual personality. One line of cases and statutes protects the rights of property owners, while the other affords no protection even to a blameless owner. Early English law distinguished between three types of forfeiture: (1) forfeiture consequent to attainder; (2) statutory forfeiture; and (3) the law of deodand. *See Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 680-84, 40 L.Ed.2d 452, 94 S.Ct. 2080 (1974); Maxeiner, *supra*, at 770-775.

A. Forfeitures Consequent to Attainder.

Forfeiture consequent to attainder was held in disrepute in the American colonies, and generally did not survive our emergence as a free nation. It deprived innocent heirs of their

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Austin v. United States, *supra*, 125 L.Ed.2d at 504-05, 113 S.Ct. at 2811. So too here, there was nothing criminal in Petitioner's ownership of her automobile. There is no discernable difference between the use of a vehicle to transport illegal liquor, and the use of an automobile to transport Petitioner's husband to a location where an act of prostitution allegedly took place.

inheritance, and it, too, often permitted dispensing with judicial determinations of guilt. Maxeiner, *supra*, at 779. The United States Constitution forbade bills of attainder. U.S. Const. art. I. §9, cl. 3. The First Congress abolished forfeiture of estate as a result of a felony conviction. *Calero-Toledo*, *supra*, 416 U.S. at 682-83; see 18 U.S.C. §3563; Re. Stat. §5326 (1874); 1 Stat. 117 (1790).

B. The Law of Deodands.

The deodand was the value of an inanimate object which directly or indirectly caused the accidental death of a subject of the Crown. *Calero-Toledo*, *supra*. The origins of the deodand have been attributed to ancient Hebrew laws. *Id. See, e.g., United States v. One 1963 Cadillac Coupe de Ville*, 260 F.Supp. 185, (W.D. Mo. 1966) (citing Exodus 21:28). The biblical reference is, however, misplaced in one very significant respect. The stoning of the ox in Exodus was not a forfeiture. Neither the animal nor its value was acquired by a sovereign. Stoning was a community action; was the form of punishment reserved for the gravest offenses; and was in no way a religious act. The animal was not sacrificed to God. In fact, no one obtained a pecuniary benefit, since the eating of the animal's flesh was strictly forbidden. The social utility of the Hebrew law was probably to discourage a blood-avenger from the kin of the deceased though the community's act of stoning the animal and to encourage owners to maintain their animals properly. *See* J. Finkelstein, *The Goring Ox: Some Historical Perspectives On Deodands, Forfeitures, Wrongful Death and The Western Notion Of Sovereignty*, 46 TEMPLE L.Q. 169, 180-182 (1973).

In contrast with the law of Exodus, early English kings assumed divine authority to turn accidental death into an opportunity to acquire revenue. As early as 1280, Edward I decreed a statute providing for the procedure by which a coroner's jury was to assess the value of the deodand. The levy was then paid to the King. 3 Law Mag. N.S. 189, n.1 (1845); Finkelstein,

supra, at 182, n.45. "As far back as the record can be traced, the beneficiary of the deodand was *never* the kin of the dead victim, but the King, or the local lord or township designated as beneficiary in the Crown's name." *Id.*, at 182 (emphasis added). The deodand had no charitable purpose. For example, it was imposed even when the instrument causing death belonged to the victim himself. *Id.*

Although the harshness and absurdity of the deodand was frequently criticized,[4] especially after the dawn of the industrial revolution, the law persisted until 1846 when Lord Campbell persuaded Parliament to enact the Deodands Abolition Bill. 9 & 10 Vict. c. 62. The deodands' persistence seems to have been entirely due to the Crown's reluctance to forego a revenue stream. As Lord Campbell stated during the parliamentary debate:

> Not only an ox that gored a man was forfeited, but if a person fell from a horse, the horse was forfeited: and if a man fell from a horse into the water and was carried down a millrace and killed by the wheel of the mill, the horse and the mill wheel were both forfeited.

77 Hansard, PARLIAMENTARY DEBATES 1028 (1845).

By linking the repeal of the deodand with the passage of the Compensation For Accidents Bill (the first English wrongful death statute), repeal was accomplished. *See Calero-Toledo*, *supra*, 416 U.S. at 681, n.19, 94 S.Ct. 2091, n.19. The speech of the Lord Chancellor during the debate provides insight into how such an irrational law could be maintained for so long.

> The system [*i.e.* deodands] which he [Lord Campbell] had dilated on was *pregnant with absurdity* . . . But he [the Lord Chancellor] should . . . suggest one or

[4] In discussing the abolition of the deodand, Lord Campbell remarked that it was a "wonder that a law so extremely absurd and inconvenient should have remained in force . . . especially . . . [as it] was called into action almost weekly." 77 Hansard, PARLIAMENTARY DEBATES 1027.

> two points for consideration . . . The first point was, that deodands formed part of the ordinary revenue of the Crown . . . There was another point . . . [in] that the property of the Crown had been granted out to lords of franchises and public corporations. They possess a property, therefore, in these deodands; their Lordships would hardly interfere with these rights, without providing in some way or other compensation or an equivalent for the loss of it . . .

77 Hansard, PARLIAMENTARY DEBATES 1032 (1845) (emphasis supplied).

Deodands did not become part of the common-law tradition of this country. *Calero-Toledo*, *supra*, 416 U.S. at 682, 94 S.Ct. at 2091; *see Parker-Harris Co. v. Tate*, 135 Tenn. 509, 188 S.W. 54, 55 (1916) ("to the credit of American jurisprudence" a doctrine so repugnant to our concept of justice was not included in our common law). Our forfeiture laws, however, have been analogized to the law of deodand. *Goldsmith-Grant Co. v. United States*, 254 U.S. 505, 510, 65 L.Ed. 376, 41 S.Ct. 189 (1921); *Austin v. United States*, *supra*, 125 L.Ed.2d at 501, 113 S.Ct. at 2809. For such an absurd and unjust law to survive for centuries despite widespread recognition of its "absurdity" attests to the difficulty of reform when economic interests lie with the government to defend its existence.[5] The true analogy in the present context is not how much modern forfeiture statutes derive from the deodand, but whether the "absurdity" of a modern statute which fails to protect an innocent owner can be allowed to survive long past any economic or social utility.

[5] Many of the same root causes for the lack of reform of forfeiture laws persist today. As this Court recently observed in *James Daniel Good Real Property*, *supra*, "the government has a direct pecuniary interest in the outcome of the proceeding." *Id.*, 126 L.Ed.2d at 504, 114 S.Ct. at 502.

C. Statutory Forfeitures.

The third type of English forfeiture laws were utilized by the Crown during the colonial period and maintained as a major revenue source by the new federal government.[6] These were statutes providing for forfeiture of goods and instrumentalities used in violation of a multitude of customs and revenue laws. *See, e.g.*, 8 Anne, c. 7, §17 (providing for forfeiture of vessels, horses, carriages, and the like used to move uncustomed goods); 12 Car. 2, c. 4 (the Navigation Act, which was broad-reaching, but included forfeiture of vessels and cargo). These cases, if involving a seizure on land, came to be heard before a jury in the Court of Exchequer, one of the three great common law courts. *C.J. Hendry Co. v. Moore*, 318 U.S. 133, 137, 87 L.Ed. 663, 63 S.Ct. 499 (1943).

It is unclear when the Exchequer began to assert *in rem* jurisdiction over forfeitures. Maxeiner, *supra*, at 775, n.46. However, Blackstone surmised that extending jurisdiction to goods seized was logical and practical when the owner was unknown or did not appear to claim the seized property. 3 W. Blackstone, COMMENTARIES *262. The Exchequer was, after all, the court with jurisdiction over all matters "touch[ing] the [Crown's] profit." *The Attorney- General v. Hallett*, 15 M & W 97, 153 Eng. Rep. 777 (Ex. 1846). In *Hallett*, it was held that "where the King's revenue is concerned . . . , [the case] shall be removed from any other Court where the action is brought, into the Offices of Pleas of the Exchequer." *Id.*, at 103, 153 Eng. Rep. at 779.

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[6] George Fishman, assistant counsel to the House Judiciary Committee writes that customs duties constituted more than eighty per cent of all federal revenues during the early years of the republic. Thus, all branches of the young federal government, including the judiciary, had a vital interest in applying doctrines which aided the collection of these revenues. Fishman, *Civil Asset Forfeiture Reform: The Agenda Before Congress*, 39 NEW YORK L.S.L.R. 121, 122-23 (1994).

From early cases, one writer has deduced that property was subject to forfeiture only after an owner appeared and confessed the conduct giving rise to forfeiture or a verdict was returned against him. *See* Maxeiner, *supra*, at 775 and n.47, citing *The Case of Shipping Wools to Calais*, Select Cases in the Exchequer Chamber [Case 31], 144 (1958) (Seldon Society, Vol. 51, 1933) (a case "upon the statute which allows no one to ship wool, etc., except to Calais; and if any shall do this, he shall loose double the value; and further by the same statute he who shall inform against him, shall have a third, after [the offender] is duly attained or confesses this in a court of record"). The early case of *Roe v. Roe*, Hardres 185, 145 Eng. Rep. 443 (Ex. 1661), seemingly supports this view. *Roe* held that, in a suit *qui tam*[7] for "importing to be sold foreign woolen [goods]," in violation of a statute, it was immaterial at trial whether "there be such a statute or no," for the issue "to be tried by the jury is, whether such cloth was imported to be sold." *Id.* Thus, the intent of the owner was clearly viewed as a vital issue.

The history of statutory forfeitures in England from the Middle Ages until the last half of the seventeenth century reflects the struggle between the Crown and the emerging merchant middle class. The battles were fought both in the Court of Exchequer and in the Parliament. The Crown sought to impose vicarious liability upon property owners (or as it was described, to exclude privity as an issue) because "statutory forfeitures were the principal means of tax enforcement." Maxeiner, *supra*, at 773. For example, in the fourteenth century Edward III was able to expand the definition of an attained's property (for forfeiture consequent to attainder) to include goods held as bailee. *See* T. Plucknett, A CONCISE HISTORY OF THE

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[7] An action *qui tam* was brought by an individual suing for himself and the Crown. Such cases occurred frequently and were sometimes known as an informer's suit. Maxeiner, *supra*, at 775, n.45, citing 1 M. Bacon, A NEW ABRIDGEMENT OF THE LAW, ACTIONS *QUI TAM*, 61 (6th ed. London 1807).

COMMON LAW, 474 (5th ed. 1956) and Maxeiner, *supra*. The Crown's efforts were somewhat thwarted, however, by enactment of the Statute of Staples in 1353. 27 Edw. 3, c. 19, 1 Stat. at Large 281 (1353). That statute provided:

> No merchant or other, of what condition that he be, shall lose or forfeit his goods or merchandises, for the trespass and forfeiture of his servant; unless he do it by the commandment or procurement of his master, or that he shall have offended in the office in which his master hath set him, or in other manner that the master be holden to answer for the deed of his servant by the law merchant, as elsewhere is used.

Id., (translation from *Mitchell, who Prosecutes for the King and Himself v. Torup*, Parker 227, 145 Eng. Rep. 764 (Ex. 1766). This statute apparently served to provide an innocent owner defense to many statutory forfeitures relating to commerce on land, until the passage of the Navigation Act under the realm of Charles II in 1660. 12 Car. 2, c. 18, *et seq.*, 1 Stat. at Large 182 (1660).

The Statute of Staples was not an isolated act of Parliament protecting innocent owners from forfeitures. For example, a fourteenth century law of the town of Cork provided for the forfeiture of any shipload of corn which was secretly unloaded and sold without going before a town bailiff "to make recognize of their covenants." 2 *Borough Customs* 174 (Seldon Society Vol. 21 (1906). The law provided for "forfeiture of all the corn thus unloaded, in such a way that the buyer shall suffer the forfeiture, and money to the value of the forfeiture shall be levied from the buyer's goods and paid to the foreign seller, and the forfeited corn shall be divided among the citizen neighbors . . ." *Id.* (translation in volume cited). Thus, only the offending party (the buyer who secretly unloaded the goods) suffered from the forfeiture.

Even more significant was the passage, ten years after the Statute of Staples, of an innocent owner provision protecting ship owners, which provided

> Whereas the Ships of divers People of the Realm be arrested and holden forfeit, because of a little Thing put in their Ship not customed, whereof the Owners of the same Ships be ignorant; it is accorded and assented, That no Owner shall lose his Ship from the fifteenth day of February next coming forth, for such a small Thing put within the Ship not customed, without his Knowledge.

37 Edw. 3, c. 8, 1 Stat at Large 319 (1363).

D. The Dual Personality of Forfeitures Becomes Manifest.

After three centuries of providing a substantial measure of protection to property owners operating in commerce, the stage was set for roughly 150 years of conflict and contradictory decisions. The "dual personality" of forfeiture, described above, became clearly manifest. The move toward complete vicarious liability of owners — removing privity of owners as an issue — was driven by two forces: the political policy of England following mercantile economic theories by enacting protectionist statute after statute to create exclusive colonial markets and exclusive trade routes for British ships; and the judicial view that customs revenues, the primary source of income to the Crown, could not be collected if judicial action were required to be taken directly against ship owners. The latter view was clearly transported to the colonies and later adopted by federal courts of the United States. *See, e.g., The Palmyra*, 12 Wheat. 1, 6 L.Ed. 531 (1827) (conviction for piracy not prerequisite to forfeiture of boat); *United States v. Brig Malek Adhel*, 2 How. 210, 238, 11 L.ed. 239 (1844) (vessel "treated as the offender" without regard to owner's conduct "as *the only adequate means* of suppressing the offense or wrong,

or insuring an indemnity to the injured party") (emphasis supplied).

This trend, however, represented but one path taken by forfeiture proceedings in England, and later in the United States. A second clearly defined path demonstrated resistance both in the English Courts and in Parliament to ignoring private property rights. The tendency of early American decisions to follow the first path was merely an expression of economic necessity as perceived by federal courts during the nation's first century.

Sheppard v. Gosnold, Vaughan 159, 124 Eng. Rep. 1018 (C.P. 1673) was an action in trespass by the lord of Bawdsey Manor for damages resulting from the seizure by the King's officers of a load of wax on which the fee ("poundage") had not been paid. The plaintiff contended that the wax had been lost off a ship at sea and drifted ashore and no poundage was therefore due. The court construed the issue as whether wreckage was to be considered the same as imported merchandise for which Parliament had provided poundage must be paid. *Id.*, at 164, 124 Eng. Rep. at 1020. Holding for the plaintiff, the court refused to apply a legal fiction that the property had offended, stating:[8]

> And goods brought or imported any where as merchandise . . . to be sold, must necessarily have an owner to set and receive the price for which they are sold, unless a man say, that goods can sell themselves, and set and receive their own prices.
>
> But wreck goods imported or brought anywhere, have no owner to sell or prize them at the time of their importation, and therefore are not brought by way of or as merchandise to England . . .

[8] In 1866 this Court in *Boyd v. United States*, *supra*, quoted the now famous words from *Sheppard*: "Goods as goods . . ." 116 U.S. 616, 637 (1886).

> Secondly, though in a loose sense, inanimate objects are said to bring things; as, in certain seasons, rain to bring grass . . . Yet, when the bringing in or importing, . . . hath reference to acts of deliberation and purpose, as of goods for sale, which must be done by a rational agent . . .
>
> * * *
>
> [W]recked goods are no goods imported within the intention of the Act, and consequently not to answer the King's duties; for goods, as goods, cannot offend, forfeit, unlade, pay duties, or the like, but men whose goods they are.

Id., Vaughan, at 171-72, 124 Eng. Rep. at 1023-24.

Only a few years earlier, Parliament had passed the Navigation Act, the broadest of the forfeiture statutes, as a major component of English policy to promote national seapower. 12 Car. 2, c. 18, 1 Stat. at Large 182 (1660); *see* Maxeiner, *supra*, at 774. The Navigation Acts were enacted "for the increase of shipping and encouragement of the navigation of this nation . . ." 12 Car. 2, c. 18, §1. Two years later, Parliament passed a customs frauds act "forasmuch as it appears that several unlawful and indirect means and devices are daily put in practise to export and import goods . . . prohibited by the Laws and Statutes of this Kingdom, as also to defraud the King's most excellent Majesty of his dues, customs, and subsidies . . . 13 and 14 Car. 2, c. 11, §1, 1 Stat. at Large 236 (1662). Both statutes contained broad forfeiture provisions without regard to the owner's conduct. Preambles such as these, emphasizing the necessity of the harsh provisions contained therein in order to secure compliance and enforcement of customs laws, were common during this period.

In 1776 came the significant opinion of the Court of Exchequer in *Mitchell v. Torup, supra*. In *Mitchell*, an informer

sought the forfeiture of the ship "Crokery" because its crew had offloaded 221 pounds of tea which had been taken on board by crew members in Norway. Bringing the tea into England violated §4 of the Navigation Act. 12 Car. 2, c. 18.[9] The jury returned a special verdict finding that the tea was smuggled into England by the crew members without "knowledge, privity or consent by the master, mate or owner's" of the vessel. *Id.*, Parker at 228-29, 145 Eng. Rep. at 765. Nevertheless, the court declared the ship forfeit, explaining:

> These words [of the statute] . . . are negative, absolute, and prohibitory; they not only operate upon the goods, but equally on the ship; and there is not a syllable that hints at the privity or consent of the master, mate or owners.
>
> The reasons of penning this clause in these strong terms is to prevent as much as possible its being evaded, for if the privity or consent of the master, mate or owners had been made necessary to the forfeiture, it would have opened a door for perpetual evasion, and the provisions of this excellent act for the increase of the navigation would have been defeated.

Id., Parker at 232-33, 145 Eng. Rep. at 766. Clearly, the British government believed that removing the owner's conduct and knowledge as an issue in forfeiture cases was necessary for the sound enforcement of customs statutes. The court held that the jury's finding of the owner's lack of knowledge was "negatory and void because it is not comprised in the issue." *Id.*, Parker at 236, 145 Eng. Rep. at 767. The court declined to apply the statute of 38 Edw. 3, c. 8, because "the Navigation Act is subsequent . . . and has altered the law by excluding privity, as the most effectual means to prevent the mischief." *Id.*, Parker at 237, 145 Eng. Rep. at 767.

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[9] The court incorrectly cites the statute. It is c. 18, §4, not c. 4 as cited. *Mitchell, supra*, Parker 227, 145 Eng. Rep. at 764.

Since a statutory forfeiture was at issue, the court's reference to instances where the law of deodand caused forfeiture without regard to the owner's innocence is, at best, curious. "[W]here a murder is committed with the sword of an innocent man, the sword is forfeited; the like of all deodands." *Id.*, Parker at 235, 145 Eng. Rep. at 767. Clearly, the court was stretching by its reference to deodands, since the reference did nothing to support the court's turning away from the statute of Edward III, which only provided a defense to statutory forfeiture.[10] The court also refused to follow *Sheppard v. Gosnold*, *supra*, yet failed to distinguish it, or even address its analysis. In short, for such a seminal decision, the Exchequer's reasoning in *Mitchell* was shallow, and the opinion ill-written. At its core, what emerges is the court's candid, but unsupported, belief that absolute vicarious liability of owners is necessary to prevent wholesale evasion of the statute and its revenue production.

The only concession offered by the court in *Mitchell* was the suggestion that the jury "neither would nor ought" to find forfeiture in cases where the quantity of tea was very small. *Id.*, Parker at 237-38, 145 Eng. Rep. 767, citing *Idle qui tam v. Vanheck*, Bunbury 230, 145 Eng. Rep. 657 (Ex. 1727) (where mariners or passengers brought a "small parcel" of uncustomed goods on board, "it would be hard the ship should be forfeited").

It is inaccurate to suggest that *Mitchell v. Torup* is anything more than a landmark on but one of the two paths that English forfeiture law began to take after the 1660 enactment of the Navigation Act. The duality of paths may be confusing, but it nevertheless persists. In 1692, the 4th of William and Mary, Parliament enacted c. 8, the statute cited by the court in *Mitchell*. It was entitled "An Act for Encouraging the Apprehending of

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[10] The court also wrongly cited the 4th of William and Mary, c. 8, as allowing the forfeiture of an innocent owner's horse if used to commit a robbery. In fact, as discussed *infra* at pp. 19-20, it provided just the contrary.

Highwaymen." 4 W & M, c. 8, 1 Stat. at Large 517 (1692). The statute began:

> Whereas the Highways and Roads within the Kingdom . . . have been of late time more infested with Thieves and Robbers than formerly, for want of due and sufficient encouragement given, and Means used, for the Discovery and Apprehension of such Offenders . . .

Id., §1. The statute provided a reward of forty pounds for anyone apprehending a robber who was later convicted. In §6, the statute allowed that such a person

> "shall have and enjoy to his . . . proper Use and Behoof the horse, furniture, arms, money or other goods of the said robber . . . Provided, always, That This Clause . . . shall not be construed to extend to take away the *right* of any person or persons to such horses, furniture and arms, money or other goods, from whom the same were before feloniously taken.

Id., §6 (emphasis supplied). This statute is of signal import for three reasons. First, it was wrongly cited in *Mitchell v. Torup* as supporting the Exchequer's holding in that case. Indeed, it is contra. Second, it provides evidence that the line of statutes and decisions respecting property rights was still in tact, even after the Navigation Act, where protection of customs revenues was not a foremost consideration. Finally, the statute strongly suggests that Parliament was acknowledging a *right* existing in an innocent owner to secure the return of property otherwise subject to forfeiture.[11]

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[11] This statute seems to have gone unnoticed in the many analyses over the past 300 years, probably because it was wrongly cited in *Mitchell*, but, for the reasons stated herein, its significance seems striking.

III. FORFEITURE LAW IN THE UNITED STATES.

The usual forfeiture proceeding in the federal courts in the early years of the republic was *in rem*, since federal forfeiture statutes were largely patterned on the English navigation and customs statutes, violations of which were cognizable in the Exchequer. However, American judges were even more reluctant than their English counterparts to impose liability in the absence of fault. For example, necessity was a good plea to violations of the embargo acts. *See, e.g., Brig Struggle v. United States*, 13 U.S. (9 Cranch) 71 (1815). Other forfeiture statutes were strictly construed so as to avoid imposing liability for blameless acts. *See, e.g., United States v. The Penelope*, 27 F. Cas. 486 (D.Pa. 1806). *See generally*, Maxeiner, at 780-81.

Nevertheless, with the birth of the new republic, federal courts tended to accept the view of the "revenue branch" of English forfeiture jurisprudence. The legal fiction of considering "the thing" as the "offender" was utilized in tacit recognition that the young nation could not otherwise reach business concerns and ship owners in England and on mainland Europe. *The Palmyra*, *supra*, 25 U.S. (12 Wheat.) 1, 15 (1827). Indeed, Justice Story described the motive of economic necessity which drove this Court's early forfeiture decisions. Speaking for the Court in *Brig Malek Adhel*, *supra*, Justice Story stated:

> The vessel which commits the aggression is treated as the offender, as the guilty instrument or thing to which the forfeiture attaches, without any reference whatsoever to the character or conduct of the owner . . .
>
> * * *
>
> It is not an uncommon course in the admiralty . . . to treat the vessel . . . as the offender . . . *And this is done from the necessity* of the case, as the only adequate means of suppressing the offense or wrong, or insuring an indemnity of the injured party.

Id., 43 U.S. (2 How.) at 233 (emphasis supplied).

In Dobbins Distillery v. United States, 96 U.S. 395, 24 L.Ed.2d 637 (1877) the Court observed that

> Nothing can be plainer in legal decision than the proposition that the offence therein defined is attached primarily to the distillery, and the real and personal property used in connection with the same, without any regard whatsoever to the personal misconduct or responsibility of the owner, beyond what necessarily arises from the fact that he leased the property to the distiller, and suffered it to be occupied and used by the lessee as a distillery.
>
> Cases often arise where the property of the owner is forfeited on account of the fraud, neglect or misconduct of those intrusted with its possession, care, and custody, even when the owner is otherwise without fault . . .

Id., 96 U.S. at 401.

The "dual personality" of forfeiture persisted, however, with this Court's decision in *Boyd v. United States*, *supra*, decided just nine years after *Dobbins Distillery*. Quoting *Sheppard v. Gosnold*, *supra*, the Court expressly rejected the legal fiction of the property as the offender. *Id.*, 116 U.S. at 637. The *Boyd* Court held that it could not assent "to the proposition that the proceeding is not, in effect, a proceeding against the owner of the property, as well as against the goods." *Id.*

Following the apparent rejection of the personification doctrine in *Boyd*, the Court revisited the issue in *J.W. Goldsmith-Grant Co. v. United States*, 254 U.S. 505, 65 L.Ed.2d 376, 41 S.Ct. 189 (1921). Despite the two independent lines of cases, the Court, albeit somewhat reluctantly, found itself constrained by precedent to follow the personification fiction. If the case were the first of its kind, it and its apparent paradoxes might compel a lengthy discussion to harmonize the section with the

accepted tests of human conduct. Its words taken literally forfeit property illicitly used though the owner of it did not participate in or have knowledge of the illicit use. There is strength, therefore, in the contention that if such be the inevitable meaning of the section, it seems to violate that justice which should be the foundation of the due process of law required by the Constitution.

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>
> * * *
>
> In breaches of revenue provisions, some forms of property are facilities, and therefore it may be said, that Congress interposes the care and responsibility of their owners in aid of the prohibitions of the law and its punitive provisions, by ascribing to the property a certain personality, a power of complicity and guilt in the wrong. In such case there is some analogy to the law of deodand by which a personal chattel that was the immediate cause of the death of any reasonable creature was forfeited.
>
> * * *
>
> But whether the reason for section 3450 be artificial or real, it is too firmly fixed in the punitive and remedial jurisprudence of the country to be now displaced.

Id., 254 U.S. at 510-11.

It is not surprising, therefore, that just five years later, the Court in *Van Oster v. Kansas*, 272 U.S. 465, 71 L.Ed. 354, 47 S.Ct. 133 (1926) denied a constitutional challenge to a Kansas statute that provided that a vehicle used in the transportation of intoxicating liquor is subject to seizure and forfeiture. The Court noted that

> it has long been settled that statutory forfeitures of property intrusted by the innocent owner or lienor to another who uses it in violation of the revenue laws of the United States is not a violation of the Fifth Amendment.

Id., 272 U.S. at 468. The Court held that so long as a property owner consented to the use of his property by another, the property could be constitutionally forfeited even if the owner did not consent to the unlawful use and had no knowledge of such unlawful use. The Court did, however, reserve the question if the same would hold true if the property had been taken without the owner's consent. *Id.*, 272 U.S. at 467.

More recently, this Court recognized that "The fictions of *in rem* forfeiture were developed primarily to expand the reach of the courts." *Republic National Bank of Miami v. United States*, 506 U.S. ___, ___, 121 L.Ed.2d 474, 113 S.Ct. 554, 559 (1992).

That brings us full circle back to *Austin*, where this Court declined to decide the issue now before the Court. The Court in *Austin* did, however, make clear that all of its precedents upholding the forfeiture of an innocent owner's property involved a penalty for negligence. Thus, the Court held that because most civil forfeitures are a form of punishment, they are limited in their severity by the Eighth Amendment Excessive Fines Clause.[12]

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[12] One must query, in light of this Court's holding in *Austin*, how the forfeiture of an innocent person's property cannot be excessive under Eighth Amendment analysis.

In sum, the history of forfeiture laws demonstrates that one line of authority, dating to the realm of Edward III, recognizes the right of a private owner of property who has not engaged in misconduct and who has no knowledge of misconduct by others in lawful possession of the property, to resist a forfeiture. The English Parliament once actually referred to this as a "right," suggesting due process implications. 4 W & M, c. 8, 1 Stat at Large 517 (1692). To be sure, another line of authority fails to support this contention. But the other line of authority relies upon a legal fiction which is inimical to valued constitutional rights protecting private ownership of property and due process as well. The economic necessities for protecting means of revenue which gave birth to this pernicious fiction are long since dead. It is time for this Court to lay to rest the fiction itself.

IV. A FORFEITURE PROCEEDING WHICH PUNISHES AN INDIVIDUAL WITHOUT REGARD TO WRONG-DOING CANNOT COMPORT WITH MODERN DAY NOTIONS OF JUSTICE AND FAIR PLAY.

It is clear from the above review of the history of forfeiture laws that the early justification for the "personification" doctrine, and the harsh results it visited upon innocent property owners are no longer relevant in a modern society which places such a high value on the right to own property. As Justice Holmes so powerfully stated:

> It is revolting to have no better reason for a rule than that it was laid down at the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.

Holmes, *The Path of Law*, 10 HARV. L. REV. 457, 469 (1897).[13] Now that this Court has recognized that civil forfeiture is

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[13] The Court in *Goldsmith-Grant Co. v. United States*, *supra*, would have done well to heed Holmes' advice. Almost three-quarters of a century

punishment, *Austin*, *supra*, it is inconsistent with substantive due process and the Fifth Amendment Takings Clause to impose such punishment on a truly innocent owner.[14] Nor has the practice of forfeiting the property of innocent owners gone unchallenged by legal scholars. Dozens of articles and commentaries severely criticize the practice.[15]

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ago, this Court in *Goldsmith* clearly recognized that the application of a forfeiture statute to an owner who "did not participate in or have knowledge of the illicit use" of his property "seems to violate that justice which should be the foundation of the due process of law required by the Constitution." *Id.*, 254 U.S. at 510. Nevertheless, the Court found the "apparent paradoxes" created by the statute were "too firmly fixed in the punitive and remedial jurisprudence to be now displaced." *Id.*, 254 U.S. at 511.

[14] House Judiciary Chairman Henry Hyde (R-Ill) documents some of the harsh results forfeiture has visited upon innocent owners in his recent publication, FORFEITING OUR PROPERTY RIGHTS: IS YOUR PROPERTY SAFE FROM SEIZURE?, (CATO 1995).

[15] In addition to the materials cited in the text, other articles condemning the practice of forfeiting the property of innocent owners include the following: Michael Goldsmith and Mark J. Linderman, *Asset Forfeiture and Third Party Rights: The Need for Further Law Reform*, 1989 Duke L.J. 1254; Tamara R. Piety, *Scorched Earth: How the Expansion of Civil Forfeiture Doctrine Has Laid Waste to Due Process*, 45 Univ. of Miami L.Rev. 911; 1994 Symposium: What Price Civil Forfeiture? Constitutional Implication and Reform Initiatives, Mary M. Cheh, *Can Something This Easy, Quick and Profitable Also be Fair? Runaway Civil Forfeiture Stumbles on the Constitution*, 39 New York L.Sch.L.R. 1; 1994 Symposium: What Price Civil Forfeiture? Constitutional Implication and Reform Initiatives, Steven L. Kessler, *For Want of Nail: Forfeiture and the Bill of Rights*, 39 New York L.Sch.L.R. 205; Anthony J. Franze, *Casualties of War?: Drugs, Civil Forfeiture and the Plight of the Innocent Owner*, 70 Notre Dame L.Rev. 369; Arthur G. Crabtree, *Seizure of Third Party's Property Associated With Drug Money: Requiring Third Parties To Become Private Police?*, 23 Sw. U. L. Rev. 79; Gordon Chang, *Supreme Court Upholds Forfeiture of Innocent Owner's Property Without Prior Notice and Hearing*, 60 Cornell L. Rev. 467.

V. A NEGLIGENCE STANDARD CANNOT BE FAIRLY APPLIED TO PETITIONER AS A CO-OWNER.

This Court stressed in *Austin*, *supra*, that forfeitures are justified "on the notion that the owner has been negligent in allowing his property to be misused and that he is properly punished for that negligence." However, in the case at bar, Petitioner cannot fairly be deemed to have been negligent in allowing her property to have been used by her husband to engage in an act of prostitution. As co-owner of the vehicle, Petitioner's husband had an independent right to use the vehicle. Indeed, it is doubtful if Petitioner could have done anything to prevent her husband's use of the vehicle under Michigan property law. Thus, it is clear that Petitioner had "done all that could reasonably be expected to prevent the proscribed use of the property." *See Calero-Toledo*, *supra*, 416 U.S. at 689. *See, e.g.*, *United States v. One 1977 Cherokee Jeep*, 639 F.2d 212, 213 (5th Cir. 1981); *United States v. Real Property Known as 6109 Grugg Road*, 886 F.2d 618, 627 (3rd Cir. 1989). Consequently, it "would be difficult to reject [Petitioner's] constitutional claim," *id.*, in this case.

Moreover, we respectfully submit that the appropriate test of innocent ownership should focus exclusively on a two-prong test: (1) Was the owner innocent of any misconduct with respect to the illegal use of property; and (2) Did the owner know of (or reasonably should have known of) the illegal use of the property and, if so, did the owner consent to the unlawful use? The social and commercial consequences of a pure negligence test are, as recent court decisions have shown, far-reaching and harmful. The better approach is to require knowledge before a duty is imposed.

> [W]hen governing decisions are unworkable or are badly reasoned, "this Court has never felt constrained to follow precedent." *Smith v. Allwright*, 321 U.S.

> 649, 665, 88 L.Ed. 987, 64 S.Ct. 757. Stare decisis is not an inexorable command; rather it "is a principle of policy and not a mechanical formula of adherence to the latest decision." *Helvering v. Hallock*, 309 U.S. 106, 119, 84 L.Ed. 604, 60 S.Ct. 444 (1940). This is *particularly true in constitutional cases*, because in such cases "correction through legislative action is practically impossible." *Burnett v. Coronado Oil & Gas Co.*, *supra*, at 407, 76 L.Ed. 815, 52 S.Ct. 443 (Brandeis, J. dissenting).

Payne v. Tennessee, 501 U.S. ___, ___, 115 L.Ed.2d 720, 737, 111 S.Ct. 2597, 2600, (1991) (emphasis supplied).

CONCLUSION

For the foregoing reasons, NACDL as amicus curiae respectfully urges this Court to reverse the decision of the Michigan Supreme Court, and to hold that the forfeiture of Petitioner's interest in her vehicle violated Petitioner's right to due process of law and constituted an unlawful taking in violation of the Fifth Amendment Takings Clause.

Respectfully submitted,

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No. 94-8729

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

TINA B. BENNIS,

Petitioner,

v.

STATE OF MICHIGAN *ex rel.*
WAYNE COUNTY PROSECUTOR,

Respondent.

On Writ of Certiorari to the Michigan Supreme Court

BRIEF OF THE AMICUS CURIAE AMERICAN BANKERS ASSOCIATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether a Michigan nuisance abatement statute that permits the forfeiture of a person's property or interest in the property, if it is used in a proscribed manner by another person, even if the owner or other interested party, had no prior knowledge of the misuse of the property, did not consent to the misuse and had no capacity to prevent it violates the Due Process Clause of the Fourteenth Amendment and/or the Takings Clause of the Fifth Amendment (as applied to the states by the Fourteenth Amendment).

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IN THE
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TINA B. BENNIS,

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EX REL. WAYNE COUNTY PROSECUTOR,

Respondent.

On Writ of Certiorari to the
Michigan Supreme Court

BRIEF OF THE AMICUS CURIAE AMERICAN BANKERS ASSOCIATION IN SUPPORT OF PETITIONER

The American Bankers Association hereby respectfully submits this brief as amicus curiae in support of the Petitioner, with consent of both the parties. The signed consents of each are filed together with this brief.

INTEREST OF THE AMICUS CURIAE

The American Bankers Association ("ABA" or "the Association") is the only national trade and professional association serving the entire banking community, from small community banks to large bank holding companies. ABA members represent approximately 90 percent of the commercial banking industry's total assets.

In the ordinary course of performing one of the core functions of the banking industry, lending money, commercial banks regularly acquire "interests" in property--mortgages on real property, liens on such things as automobiles and boats, and so forth--as collateral for loans made. In the event that such property ends up as the subject of a civil forfeiture, banks stand to lose their security interest in their collateral. Under the Michigan Supreme Court's ruling in this case, carried to its logical and inevitable conclusion and applied elsewhere to similar "abatement" statutes, our member banks would have no opportunity to oppose such a forfeiture or otherwise protect their interest as a matter or right, because many old state statutes fail to contain a complete "innocent owner" provision.[1]

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[1] *See*, Robert M. Sondak, *Justices to Rule on Forfeiture of Innocent Owner's Property*, Money Laundering L. Rep. (Leader Publishers, New York, N.Y.), vol. 5, no. 10, June, 1995, at 5-6. The author points out that the *Bennis* case, if allowed to stand will be harmful to lenders because of the older federal laws and many state laws that do not provide innocent owner protection. Sondak states that "joint property owners, mortgagees, lessors and the like *who cannot control how others use their property* will be significantly affected by the outcome of this case." (emphasis added)

The ABA respectfully submits this brief to urge the Court to reverse the decision of the Michigan Supreme Court which ignored trends at the state and federal levels to include and expand the "innocent owner" defense under the civil forfeiture laws.

This case deals with the Wayne County Prosecutor's attempt to enforce a civil forfeiture under the Michigan nuisance abatement statute, M.C.L. 600.3801 et seq., of a car that was co-owned by the spouse of the petitioner and used by that spouse during the commission of an unlawful act of gross indecency. The petitioner asserts, with considerable plausibility, that she was ignorant of her husband's illegal use of the vehicle and did not condone it. The Michigan Supreme Court held that it is irrelevant whether that is so because there is no "innocent owner" defense in the statute. The petitioner's interest in the property can be forfeited whenever it is entrusted to another person who uses it illegally, regardless of whether the person entrusting the property has any culpability for the illegal act. While banks, as "lienholders," can have their liens repaid under the statute, it is only **after** an officer of the court deducts the expenses of keeping the property and the costs of the sale and paying all liens according to priorities, and even this is possible only if the lienor establishes that it had no notice that the property was being used or was to be used for the maintenance of a nuisance. M.C.L. 600.3825 (3)

Banks and other financial institutions recognize that the criminal and civil forfeiture laws serve a useful purpose in removing the profit from illegal activity. Our nation's bankers have been considered "partners" with law enforcement efforts to prevent financial institutions from unwittingly aiding individuals who break the law.[2] However, the state's assertion of sweeping authority to seize property rights of those who have done nothing wrong is frightening. This position forces legitimate businesses, such as financial institutions, to prove their lack of knowledge or awareness concerning borrower activities. In addition, this proof can only occur after the property is to be sold. This is unfair, particularly to commercial entities.

If the decision is left to stand, prosecutors and other government officials will quickly recognize that they can avoid the use of what law enforcement considers to be the more cumbersome forfeiture laws[3] by creative use of the

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[2] According to a May, 1995 GAO Report, "Financial institutions are in a unique position to assist law enforcement at the federal and state levels by reporting suspicious transactions that might indicate money laundering." *Money Laundering: Needed Improvements for Reporting Suspicious Transactions Are Planned* (GAO/GGD-95-156, May 30, 1995), at 36.

[3] Clearly, prosecutors are searching for ways to stem the tide of state laws that "curtail" civil asset forfeiture. In the September/October 1993 issue of Financial Crimes Report published by the National Association of Attorneys General, the then Supervising Deputy Attorney General for the California Asset Forfeiture Program bemoaned the

more arcane statutes such as the Michigan nuisance abatement law. Thus, the law enforcement authorities who have been losing some of their forfeiture authority at the state and federal levels will avoid those "obstacles" by using obscure statutes that do not contain a clear innocent owner defense. Such a strategy avoids the requirement now present in many modern state forfeiture laws that protection for innocent parties be considered prior to the government "taking" of one's interest in property. Financial institutions will be prevented from having their day in court to protect their property prior to sale if this decision is not reversed.

If this effort is allowed to succeed, financial

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problems facing prosecutors who were losing the broad powers of the forfeiture laws and advocated the use of "adoptive seizures," a process by which the states use a federal forfeiture law instead of the state law. The author gives this rationale:

> Recent media coverage about civil asset forfeiture presents a serious challenge to both state and federal civil drug asset forfeiture statutes. Whereas the challenge to the federal statutes is in its infancy, the attack on state statutes has matured into a serious threat to the continued viability of state asset forfeiture. Jeffrey J. Koch, *Adoptive Seizures and Judicial and Legislative Challenges to Jurisdiction*, Financial Crimes Rep. (Nat'l Assoc. of Atty's Gen.) Sept./Oct. 1993, at 7.

institutions will restrict the flow of credit or other banking transactions to individuals when there is even the slightest suspicion of illegal activity. More importantly, this implied duty to investigate a customer's background far beyond the basic charge to perform a credit check will result in a huge increase of credit costs for all of our potential borrowers including those least able to absorb additional costs. Our nation's banks, who are in the front line of establishing programs to "know your customer"[4] and have been commended by the government for these efforts, will never be able to rely on their deterrence programs again, if the decision is allowed to stand. So long as there exists even the remote possibility that an institution may lose the value of its loan or collateral on a piece of property because the government has argued that the property was used to facilitate a crime by another individual, the financial institution will have to substantially limit its business activities.

As far as increased costs, in order to comply with the theory under Michigan's law that a lienor not have "notice" that the seized property was being improperly used, banks would not be protected by simply performing an inquiry of a borrower's creditworthiness. Instead, financial institutions would be charged with an ongoing duty of inspecting property and determining if the use was proper. This duty

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[4] *See Suspicious Transaction Reports* (GAO/GCD-95-156, May 30, 1995 at 12 and Cliff E. Cook, *Complying with the Spirit of BSA: "Know Your Customer" Policies and Suspicious Transactions Reporting*, ABA Bank Compliance, Summer 1991, at 7.

to investigate is difficult for seasoned law enforcement officials, let alone commercial bankers. Even if an institution carries out this requirement, the consumer will be harmed. Having bankers determine the legitimate use of collateral will result in increases in processing time for all lending transactions, spiraling loan costs and the aforementioned restriction of credit. These problems can become more pronounced in residential mortgage financing which must be handled in a timely manner due to volume and for loans to small businesses who are always the first harmed when credit is tightened. This result will hamper both domestic and international commerce and is simply not justified.

No prudent lender can rest knowing that the potential exists that the property supporting a loan transaction may be seized and its value lost. America's banks are implementing strong procedures to identify their customers to determine whether illegal activity has occurred. If any bank makes a good-faith determination that a customer is honest and a good credit risk, the government should not be able to come in and seize the collateral for a loan without allowing the use of the innocent owner defense. Fairness requires no less.

Additional problems will exist for lenders if the government prevails. Lenders who refuse to make loans collateralized by property for fear of a forfeiture run a risk of violating their duty to the customer. A lender's effort to investigate prospective borrowers could conflict with its efforts to comply with the anti-discrimination laws or could

subject it to defamation claims.[5]

The Association believes that the decision of the Michigan Supreme Court must be reversed and that an innocent owner defense must be made available as a matter of constitutional right in any statute that authorizes forfeitures. While the banking industry is hopeful that the model Uniform Controlled Substances Act, drafted by the National Conference of Commissioners on Uniform State Law and containing clear protection for innocent owners and lienors, will be adopted by many states, there are still many state statutes that authorize seizure and forfeiture of property that will not be affected. Therefore, leaving this decision intact will have a major impact throughout the country.

SUMMARY OF THE ARGUMENT

In response to the scope and breadth of the asset forfeiture laws, Congress, the courts, and various states have begun sharply to limit the government's power to seize assets.[6] This momentous shift toward protecting innocent

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[5] See *Ricci v. Key Bancshares of Maine, Inc.*, 662 F. Supp. 1132 (D. Me. 1987) (upholding of $15,000,000 punitive damage award against a bank for terminating a customer's line of credit based on an incorrect tip from the FBI).

[6] *See* Robert M. Sondak, *Further Limits on Forfeitures*, Money Laundering L. Rep. (Leader Publications, New York, N.Y.), vol. 3, no. 12, July, 1993 and Raymond P. Pepe, *Uniform Law Comm. Approves Asset Forfeiture Amendments*, Money Laundering L. Rep. (Leader

owners is in stark contrast to what the Michigan Supreme Court is allowing to transpire--circumvention of these recently enacted forfeiture statutes by prosecutors who utilize arcane laws that do not reflect the fairness of the new limits on forfeiture authority. Permitting the use of statutes such as the Michigan abatement law will only succeed in fulfilling the mission of what prosecutors have called "'social engineering' accomplished through government intercession in commercial activity harmful to the economy as a whole."[7]

The Michigan Supreme Court committed a grievous error by relying on *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974), for the proposition that there can be no innocent owner defense without specific reference in the statute. There have been several cases that have succeeded in expanding the protection for innocent owners and these developments have been neglected by the Michigan Court. Our brief argues that this decision cannot be left to stand because it will only succeed in punishing the innocent by taking real and personal property from those who have had nothing to do with the underlying offense.

Publications, New York, N.Y.), vol. 5, no. 2, September, 1994. Also, California Deputy Attorney General Jeffrey Koch announced that "the attack on state [forfeiture] statutes has matured into a serious threat to the continued viability of state asset forfeiture." Financial Crimes Report, at 7.

[7] Holmes, *History and Purpose of Arizona Forfeiture Under A.R.S. 13-4301*, at 1 (1990), reprinted in ABA National Institute on Forfeitures and Asset Freezes (1990).

ARGUMENT

I. The Holding of the Supreme Court Below Should Be Reversed.

It is contrary to the stated goals of Congress and the state governments under all of the recent forfeiture laws to fail to consider the innocence of the owner of property that has been seized and forfeited. In fact, in the prefatory note to the draft Uniform Controlled Substances Act, drafted by the National Conference of Commissioners on Uniform State Laws, the authors state that:

> the wide-spread acceptance of such statutory defenses [innocent owner] illustrates the acceptance of the more general proposition that citizens ought not to be subject to the unconstrained power of government officials, no matter how appropriately most of the officials would discharge their responsibilities. Given the extent to which commercial interests can be implicated by modern forfeitures, statutory protection of the interests of innocent owners is required because in typical commercial transactions, due diligence cannot be satisfied by reliance upon expectations regarding prosecutorial discretion.[8]

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[8] In fact, the Uniform Law Commissioners specifically reject the approach of allowing forfeiture if the owner was "merely negligent respecting how their property would be used. Instead, the Act subjects an owner's interest to forfeiture only when the owner was willfully blind respecting how their property would be used." Uniform Controlled Substances Act (1994), 4-5 (Prefatory Note).

The Commissioners felt so strongly about protecting innocent owners that they stressed that the Uniform Act requires that the state "proceed diligently with forfeiture proceedings" because the intent behind the model law was to ensure that innocent owners not "suffer the restraint of their property indefinitely, and the simple fact that the State has proceeded against property will interfere with marketability no longer than necessary." Prefatory Note for Uniform Controlled Substances Act (1994), drafted by the National Conference of Commissioners on Uniform State Laws, p. 3.

On the federal level, the Chairman of the House Judiciary Committee has reintroduced H.R. 1916, the "Civil Asset Forfeiture Reform Act," to "completely overhaul asset forfeiture law and restore basic constitutional guarantees such as due process, the presumption of innocence, and the right to own and enjoy private property."[9]

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[9] *See* Cato Institute book release "Government's forfeiture powers should be reined in, Chairman Hyde says in new Cato book." Cato Institute, News Release: Book Release (D.C.), June 22, 1995. *See also* a 1994 law review article, Roger Pilon, *Can Asset Forfeiture Law Be Justified*, N.Y.L. Sch. L. Rev. 313, 311-333 (1994) argues that due to the "manifest injustice" in having the property seized but the rights of the owner never coming into consideration "Congress and several states in the 1980's enacted innocent

II. The Michigan Supreme Court's Reference to the "Landmark" Forfeiture Decision in *Calero-Toledo* Neglects Recent Supreme Court Rulings Lessening the Broad Forfeiture Powers.

The Michigan Supreme Court, addressing the issue of the historic treatment of not affording innocent owners any consideration in a forfeiture proceeding cites the 1974 case *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974), which rejected the asserted innocence of a property owner as a defense in that case. However, even this case shows a reluctance to ignore completely an owner's innocence:

> [i]t would be difficult to reject the constitutional claim of an owner whose property subjected to forfeiture had been taken from him without his privity or consent...Similarly, the same might be said of an owner who proved not only that he was uninvolved in and unaware of the wrongful activity, but also that he had done all that reasonably could be expected to prevent the proscribed use of his property; for in that circumstance, it would be difficult to conclude that forfeiture served legitimate purposes and was not unduly oppressive.

Calero-Toledo v. Pearson Yacht Leasing Co., at 689-90.

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owner defenses."

(emphasis added).

In other words, if an innocent owner defense is not provided for in the statute, as in this case, one would have to be created. The Constitution demands it.

Also, in *Austin v. United States*, 509 U.S. ___, 113 S. Ct. 2801 (1993), a decision that addressed whether civil forfeiture is subject to the excessive fines clause, this Court again limited the scope of the civil forfeiture laws and ruled that "forfeiture serves at least in part to punish the owner." *Id.*, 509 U.S. at ___, 113 S. Ct. at 2810. Therefore, innocent owners must be given an opportunity to avoid punishment that occurs when the government seizes and abates one's vehicle.

Finally, in another 1993 case in which the ABA participated as amicus curiae,[10] this court expanded the "innocent owner" provisions under federal forfeiture law beyond bona fide purchasers for value and allowed donees access to the statutory defense as well.

CONCLUSION

There has been an unmistakable movement in the courts and the state and federal legislatures against expanding the government's forfeiture powers. While the Association respects and supports efforts to seize the properties of criminals used by them to advance illegal activity, the

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[10] *United States v. A Parcel of Land*, 113 S. Ct. 1126 (1993).

problem of relieving innocent owners, such as lenders, of the unintended effects of these laws needs to be addressed. For these reasons, the American Bankers Association, as amicus curiae, urges this court to reverse the decision of the Michigan Supreme Court.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

TINA B. BENNIS,
Petitioner,
v.
STATE OF MICHIGAN ex rel.
WAYNE COUNTY PROSECUTOR,
Respondent.

On Writ of Certiorari to the
Michigan Supreme Court

BRIEF OF THE AMERICAN ALLIANCE FOR RIGHTS AND RESPONSIBILITIES, THE ALLIANCE FOR A SAFER, GREATER DETROIT, THE ELEVENTH PRECINCT POLICE-COMMUNITY RELATIONS COUNCIL, AND THE COMMUNITY ANTI-DRUG COALITIONS OF AMERICA AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI CURIAE*

The American Alliance for Rights & Responsibilities ("AARR") is a national nonprofit organization dedicated to improving civic and community life and the public spaces that support it.[1] The AARR has had extensive

[1] The AARR's Board of Directors includes the President of the ABC Television Network (of ABC/Capital Cities, Inc.), the General Counsel of Connecticut Mutual Life Insurance Company, a past President of Stanford University, a former Assistant Attorney General, and a past President of the American Bar Association.

experience assisting community groups in closing down local drug hubs and eradicating open-air drug and prostitution markets. The AARR, for instance, has provided legal and technical assistance to public housing tenants and managers in combating drug markets and other street-level problems. It also has conducted training sessions for anti-crime groups.

The AARR has actively promoted and defended a variety of measures designed to improve the quality of urban life. For instance, the AARR helped draft the anti-aggressive-solicitation measures that are currently in place in Washington, Baltimore, Berkeley, Cincinnati, Santa Cruz, and Long Beach. The AARR has defended similar ordinances in court and has published numerous articles on this subject in the legal literature and the mainstream press, including the leading law review article on the history and constitutionality of panhandling controls, and opinion-editorials appearing in *USA Today*, *The Washington Post*, *The ABA Journal*, *The Sacramento Bee*, and *The Dallas Morning News*. The AARR also has defended anti-drug loitering ordinances, drug-related evictions and security searches in public housing, regulations on urban camping, and service learning requirements and tailored drug-testing programs in public schools. Throughout these efforts, the AARR has emphasized the importance to communities of safe, welcoming, and civil public spaces, while challenging extreme assertions of rights that block community progress.

The AARR has advocated the increased utilization of civil remedies, including seizures, in its speeches, workshops, and technical assistance. The AARR highlighted the effectiveness of seizures, particularly of automobiles, in *The Winnable War: A Community Guide to Eradicating Street Drug Markets*, which has been used by over 14,000 grass-roots groups nationwide and praised by editorial writers, government officials, and drug experts. In *The Winnable War*, the AARR discussed how seizures

focus on the demand side of drug markets by compelling families to confront the harmful results of their drug habits, and by forcing customers rather than hosting neighborhoods to pay the penalty for illicit activities. It stated, "[S]eizures can have a deeply chilling effect on drug sales across an entire city, especially among suburban drug buyers who travel to the city to make their drug purchases." *The Winnable War*, at 55.[2] These same principles apply to open-air prostitution markets, which rely on customers who drive into deteriorating neighborhoods solely to solicit illegal services.

Joining AARR in support of the Respondent are: The Alliance for a Safer, Greater Detroit ("The Alliance"); The Eleventh Precinct Police-Community Relations Council ("the Council"); and the Community Anti-Drug Coalitions of America ("CADCA").

The Alliance strives to reduce crime and the fear of crime in Greater Detroit and to improve the image of Detroit and its environs as a safe place for residents, visitors and businesses. Toward this end, The Alliance fosters communication and cooperation between neighborhoods, the business community, and the justice system. One specific goal of The Alliance is to reduce drug trafficking and violent crime through the systematic identification and apprehension of those involved in such activities.

Similarly, CADCA's mission is to be a membership organization that promotes and facilitates comprehensive responses to the nation's problems of drugs and violence. CADCA is a national association for community coalitions. It grew out of the National Office of Drug Control Policy in recognition that coalitions are effective in combating drugs and violence. Coalition programs are effec-

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[2] Forfeitures and seizures were also highlighted as useful in *A Civil War*, an AARR-sponsored guide to civil remedies against flagrant drug markets, which was drafted by Cadwalader, Wickersham & Taft.

tive because they are developed within the community—community solutions for community problems.

The Council is a grass roots community association of volunteers living in the same neighborhood where Mr. Bennis engaged in illicit sexual activity. These residents have suffered direct harm caused by the open-air prostitution market that Wayne County is trying to shut down.

The *amici* fully recognize that the threat of vehicle forfeitures remains an important deterrent to drug and prostitution activity. Since 1988, when the Wayne County Prosecutor began relying on the statute at issue to seek forfeiture of vehicles involved in drug and prostitution activity, the Detroit neighborhoods—which were suffering in desperation from the destructive effects of drug and prostitution markets—have finally begun to see some relief. In May 1995 alone, Detroit police seized 221 cars used to facilitate prostitution. Over 65% of these cars were licensed to nonresidents of the impacted neighborhoods. The variety of out-of-state license plates, coming from across the Midwest and Canada, demonstrates that attempts to curb illicit drug and prostitution markets must reach beyond the providers and address the demand side of the problem.

The *amici* view the Petitioner's constitutional challenge to the Wayne County program as an attempt to use the courts to prevent a measured and effective public safety initiative. The Wayne County program is a balanced and innovative way to deter community-destroying prostitution markets. The program places burdens on those who impose on other communities, while it avoids expensive and unnecessary incarceration. The *amici* believe it is fair to address drug and prostitution markets by focusing on the demand side of the equation, and, based on research, the *amici* have concluded that programs such as Wayne County's are useful in re-establishing communities as fit places to live, work, recreate, and raise families.

STATEMENT OF THE CASE

This case arises out of a community's efforts to stop the cumulative and harmful effects of prostitution and illicit drug use on its neighborhoods. The question presented to the Court is whether a state civil statute focusing on all potentially responsible parties for a public nuisance violates the Fifth and Fourteenth Amendments of the Constitution. The statute at issue allows communities to abate a public nuisance, such as property intimately involved in illegal activity, by forfeiture. Such abatement may encompass the property interests of uninvolved co-owners of the targeted nuisance. These co-owners are uninvolved to the extent their own conduct is not tied to the proscribed use of the property by direct participation or explicit permission.

One day in 1988, the Petitioner's husband, John Bennis, drove his car into a Detroit neighborhood and picked up a passenger standing on the corner.[3] The passenger, Kathy Polarchio, earlier had been seen flagging down passing vehicles. Mr. Bennis and Ms. Polarchio were followed by Detroit police officers and later found engaged in an illicit sexual act—while still in the Bennis car, in plain view on a public street. Petitioner's husband was arrested and later convicted for gross indecency. A suit also was brought by the county prosecutor alleging that the Bennis car was a nuisance subject to abatement by forfeiture.[4]

The hearing on the nuisance complaint was an equitable proceeding. The Petitioner asserted that she had no knowledge that her husband used their car to engage in illicit conduct and contended that her property interest should not be forfeited. The judge, however, addressed a number of factors before concluding that Mrs. Bennis'

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[3] One witness at the nuisance abatement proceeding testified that he had seen the Bennis vehicle in the neighborhood before.

[4] *See* Michigan Compiled Laws Annotated, § 600.3801-3835.

interest could be extinguished by forfeiture. He addressed the acts giving rise to the public nuisance. He considered the fact that the family readily had available other transportation, i.e. a second car. The judge also considered the value of the car (an 11-year-old Pontiac) and the fact that little if any money would be available for distribution after deducting the costs of seizure and sale of the vehicle.

The Michigan Court of Appeals reversed the lower court's decision on interpretation of the statute. The Michigan Supreme Court then reversed the judgment of the appellate court. The state supreme court also rejected Petitioner's arguments that the statute, both facially and as applied to her, violated provisions of the federal Constitution. Specifically, forfeiture of her property interest in the car did not violate the Takings Clause of the Fifth Amendment or the Due Process Clause of the Fourteenth Amendment.

SUMMARY OF THE ARGUMENT

The Constitution undoubtedly permits states to enact laws providing for the forfeiture of property intimately involved in an owner's criminal activity. Thus, for example, an owner who uses his boat or automobile for drug trafficking or prostitution may properly have his ownership interest in that property extinguished. The instant litigation concerns the interest of a co-owner in property used for criminal activity.

The Respondent has a legitimate interest in deterring crime and using forfeiture to address property intimately involved in certain illegal activity. To the extent incidental effects and burdens are placed on uninvolved co-owners of the targeted property, the state has a further legitimate interest in structuring those consequences to induce cooperation in stopping the deterioration of its neighborhoods. And subjecting the property interests of these co-owners to possible forfeiture is reasonably related to the state's legitimate interests.

Admittedly, the Michigan statute affects and burdens the uninvolved co-owner of certain property, the illicit use of which constitutes a nuisance under state law. The primary goal of the statute is to deter illegal activity. One incidental effect is that Mrs. Bennis' property interest in the car, like her husband's interest, was subject to possible forfeiture. The incidental burden on Mrs. Bennis, and other uninvolved co-owners, is that she now must take a more active approach to how her property is used, to protect the community and to preclude her future exposure to forfeiture.

These effects and burdens on the uninvolved co-owner do not violate the Takings and Due Process Clauses of the Constitution. There are existing protections for the truly "innocent" co-owner whose vigilance could not have stopped the illegal usage. One such protection is the equitable power of the courts to consider the factors that shape each individual case of forfeiture. Other protections arise from the federal Constitution and have been developed through the Court's forfeiture jurisprudence.

The Court should not prohibit states from developing laws, consistent with the Court's jurisprudence, to address the serious problems communities are facing today. One tool communities are using to address neighborhood deterioration is civil forfeiture. The pedigree of civil forfeiture is well documented in our legal history. Yet, its use admittedly raises difficult questions concerning individual responsibility, equity, and property rights. These issues are best resolved through the legislature and judicial processes of the states, rather than the elaboration of new federal constitutional doctrines.

In this case, Petitioner is arguing for a curious amalgam of state and federal law that would make it very difficult to use civil forfeiture for property jointly owned by a husband and wife. Petitioner argues that the doctrine of negligent entrustment should define her exposure to civil forfeiture. She contends that she could not have legally

barred her husband from driving the car and thus that her property interest in the car is effectively immune from forfeiture. The Court should reject this effort to apply state legal doctrines out of their proper context, in the guise of constitutional adjudication.

ARGUMENT

I. THE STATE HAS A LEGITIMATE INTEREST IN PROTECTING ITS COMMUNITIES FROM THE IMPACT OF PROPERTY USED TO FACILITATE CRIMINAL CONDUCT.

The state of Michigan has a legitimate interest in focusing on property intimately involved in certain crimes. Neighborhood integrity is severely threatened if communities cannot address the supply and *demand* sides of prostitution and illicit drug use. Depriving individuals such as Mr. Bennis of the primary vehicle, figuratively and literally, for their unlawful conduct is a viable option for communities addressing the demand side of this conduct. Burdening the property interest of co-owners of the vehicle, with possible forfeiture of that interest, is rationally related to this goal.[5]

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[5] The Mayor of Chicago, Richard Daley, once commented on the intimate relationship between a car, a "john" or customer, and prostitution. In addressing a proposed ordinance to seize the cars of certain motorists, he stated,

> When someone commits a crime and you take their car—oh, my God, it's like taking their home.
>
> It's amazing. Americans have a love relationship with a car . . . You can put them in jail, but when you take their car, it'll have a dramatic impact on communities that have prostitution.

See Fran Spielman, *Council Cracks Down on 2 Street Menaces*, Chicago Sun-Times, July 30, 1992, News at 4.

Although the instant litigation deals with an automobile used for an act of gross indecency, cars are intimately involved with neighborhood deterioration in other ways. For example, they are used for the distribution of controlled substances. More importantly, an automobile's connection to ill-gotten wealth and prestige can have a significantly negative impact on children. U.S. District Court Judge Blanche Manning once commented, "The only role models these kids have are their teachers. But when they leave school, their role models are the young men committing crimes and driving big, beautiful cars around until they get arrested." *See* Patricia Callahan, *Judges Give 'Adopted' CHA Building Reprieve From Neglect, Hopelessness*, Chicago Tribune, December 28, 1994, Chicagoland at 2.

In its forfeiture jurisprudence, the Court has recognized the intimate relationship an object can have to certain crimes. In *United States* v. *The Cargo of the Brig Malek Adhel*, 43 U.S. (2 How.) 210 (1844), the Court addressed forfeiture of a ship due to the acts of primarily one individual. The captain had engaged in piratical conduct prohibited by a federal statute. The owners of the ship contested its forfeiture insofar as they had no knowledge of how their ship would be used. The Court, nevertheless, held that the "innocence" of the owners could not "withdraw the ship from the penalty of confiscation under the act of Congress." *Id.* at 232-33.

The Court in *Brig Malek Adhel* did not use the ship as a conduit for punishing the chiefly culpable individual. The captain apparently had been punished. And there were no issues of personal jurisdiction which shaped the Court's decision. Yet, the Court still upheld the forfeiture of the ship. The rationale seems to have rested on the intimate relationship between the prohibited conduct and the vessel. The Court states, "And this [condemnation of the ship] is done from the necessity of the case, as the only adequate means of suppressing the offence or wrong . . ." *Id.* at 233. Without the ship, there could be no piracy.

The forfeited car underlying the instant litigation was intimately related to the offense punished. Mr. Bennis could not have found other means of transportation adequate for acquiring Ms. Polarchio's services. The car was uniquely necessary both for getting to the prostitution

market and in "hosting" the illicit sexual act. The state should be allowed to focus on both the individual engaged in the illicit conduct and the vehicle which facilitated that conduct.

Subjecting a Co-Owner's Property Interest in an Abatable Nuisance to Possible Forfeiture Is Reasonably Related to the Legitimate Interest.

The incidental burdens placed on co-owners of vehicles creating an abatable nuisance are a reasonable consequence of the statutory scheme. The fact that Mrs. Bennis was a named defendant in the civil suit for forfeiture does not change the nature of her burden. When the state moved against the Petitioner's husband and the instrument of his conduct, the Petitioner's property interests necessarily were at issue. However, the state should not be precluded from abating a public nuisance simply because its actions may have negative consequences on other individuals.

Insofar as co-owners are induced to pay more attention to the use of their property, the Michigan statute is reasonably related to the state's legitimate interests. The possible forfeiture of property interests in co-owned property builds a partnership between co-owners and communities in the effort to preserve neighborhood integrity. A state's aim in producing this effect should not be considered illegitimate or arbitrary. The Court has stated that using forfeiture to fashion owners into a "secondary defense" against a proscribed use of property is "within the limits of due process." [6]

[6] *Van Oster v. Kansas*, 272 U.S. 465, 467-68 (1926).

II. THE UNINVOLVED CO-OWNER IS PROTECTED BY SUBSTANTIVE CHECKS ON THE STATE'S USE OF CIVIL FORFEITURE.

A. There Are Existing Federal Constitutional Protections for Co-Owners of Property Subject to Forfeiture.

Specific provisions of the federal Constitution already constrain a state's use of civil forfeiture proceedings. In *Austin v. United States*, 509 U.S. ——, 113 S.Ct. 2801 (1993), the Court held that the Eighth Amendment's prohibition against excessive fines applied to civil forfeitures under a federal statute. Petitioner's property interests then were protected by the Eighth Amendment. The state court, for example, could not have forfeited her interest in the family's second car, left parked in the garage. However, the Court in *Austin* did not rule that the property interests of an uninvolved owner always should be compensated. Rather, the Court declined to create a formula for applying the Eighth Amendment.[7] No Eighth Amendment challenge has been raised in this case.

The Constitution also requires fair procedures for forfeiture. For example, in *United States v. Good Real Property*, 510 U.S. ——, 114 S.Ct. 492 (1993), the Court applied the Fifth Amendment's procedural due process analysis to *ex parte* seizures under a federal, civil forfeiture statute.[8] The Court ruled that,

> Unless exigent circumstances are present, the Due Process Clause requires the Government to afford

[7] Justice Scalia's concurrence, however, offers a line of inquiry courts might use. He focuses on the relationship of the seized property to the underlying offense, as opposed to focusing on the value of the property. *See Austin*, 113 S.Ct. at 2815 (Scalia, J., concurring in part and concurring in the judgment).

[8] Although the seizure was under a federal and not state statute, it is assumed that the holding in *Good Real Property* applies to states through the Fourteenth Amendment.

> notice and a meaningful opportunity to be heard before seizing real property subject to civil forfeiture.

Id. at 509 (citation omitted).

Finally, the Equal Protection Clause of the Fourteenth Amendment may confine use of civil forfeiture statutes in two distinct ways. First, the states cannot apply their police power behind civil forfeiture in a discriminatory manner. The Petitioner does not argue that Michigan has discriminated against her by using its nuisance abatement efforts to protect only certain communities. Second, the Equal Protection Clause mandates that the state have a legitimate interest in subjecting the property interests of uninvolved co-owners to possible forfeiture. The Petitioner does not argue that uninvolved co-owners of an abatable nuisance constitute a protected class requiring more than rational basis protection.[9]

B. Equitable Powers of the Courts Are a Significant Check on the Potentially Harsh Effects of Civil Forfeiture.

The instant litigation provides a clear example of the significant protection afforded uninvolved co-owners by the equitable powers of the Michigan courts. The Michigan trial court, during the nuisance proceeding, openly and carefully addressed the equities involved in forfeiting Mrs. Bennis' interest in the car.[10] The Michigan Supreme Court further clarified,

> It is not contested that this is an equitable action. That being the case, it is critical to recognize that the trial judge considered alternatives on the record and, in the exercise of his discretion, fashioned an appropriate remedy, abating the entire interest in the vehicle.

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[9] Notably, equal protection analysis can be identical to due process analysis.

[10] Transcript of the hearing held on November 2, 1988, at 188-89 and 193.

Michigan ex rel. Prosecutor v. Bennis, 447 Mich. 719, 742 (1994). Mrs. Bennis' interests did not go unaddressed and unprotected. Protecting such interests, however, should not mean the state cannot abate a public nuisance or, alternatively, the state must compensate co-owners in every instance.

The Court's forfeiture decisions confirm that a decision-maker's discretion, in weighing the equities of a case, can be sufficient protection for innocent claimants. In *United States v. One Ford Coach*, 307 U.S. 219 (1939), the Court addressed the harsh consequences made possible by literal interpretation of a federal forfeiture statute. At issue was the scope of investigation a creditor had to demonstrate to mitigate forfeiture of its interest in an automobile seized because of its unlawful use. In analyzing the statutory history, the Court referenced an innocent claimant's recourse to the discretion of the Secretary of the Treasury or the Attorney General in seeking mitigation. This recourse was a "clear remedy" for such claimants. *Id.* at 236.[11]

The Michigan court's ability and concern to weigh the equities in the forfeiture proceeding protected the Petitioner's interest more than the discretion referenced in *One Ford Coach*. The judiciary has no vested interest in the decision-making process determining whose property will be seized. In contrast, an official from the executive branch might be less objective.

Furthermore, it is the equitable power of the courts that protects a truly innocent co-owner from having to forfeit her interest by virtue of her status alone.[12] All

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[11] *Cf. United States v. United States Coin & Currency*, 401 U.S. 714, 721 (1971) (Secretary of the Treasury's discretion is referenced with the implication that it protects innocent claimants).

[12] In *Goldsmith-Grant Co. v. United States*, 254 U.S. 505, 512-13 (1921), the Court states, "There may, indeed, be greater risk to the owner of property in one form or purpose of its bailment than

uninvolved co-owners of property creating a public nuisance will not have their interest forfeited. Rather, due to the relationship such co-owners have to the property and to the people who create the nuisance, these uninvolved co-owners *might* have their interest forfeited. The courts will have the facts of each case to decide the issue.

C. The Protection Afforded by the Political Process in This Case's Legal Context Should Not Be Readily Dismissed.

The state's political process should not be overlooked as substantial protection for the uninvolved co-owner of property subject to forfeiture. While the age of the Michigan statute at issue evidences the strong tradition of civil forfeiture in our legal history,[13] the statute is still a product of legislative deliberation. Consequently, the voters in Michigan have unhindered and significant recourse to the voting booth to determine how competing interests are balanced in the context of civil forfeiture.

The fact that similar statutes are being questioned and in some cases changed, in fora other than the federal Constitution, further suggests that the Court should not rule for the Petitioner. Rather, the Court should allow the electorate in Michigan and other states to engage in more legislative dialogue. The *Amicus* brief of the American Bankers Association states that a current draft of the model Uniform Controlled Substances Act contains an "innocent owner" defense.[14] Such proposed legislation may offer broad protection for certain categories of owners. Yet, while states should be free to adopt such

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in another, but wrong cannot be imputed to him by reason of the form or purpose."

[13] The statute was enacted in 1915 and amended ten years later. *See Bennis*, 447 Mich. at 759 (Levin, J., dissenting).

[14] Brief of the *Amicus Curiae* American Bankers Association in Support of Petitioner at 8.

proposed statutes, the Court should not mandate their adoption in whole or in part. The federalist form of government created by our Constitution militates against forcing Michigan to follow suit if it chooses not to.[15]

III. PETITIONER'S CONSTITUTIONAL CHALLENGES TO THE STATUTE ARE WITHOUT MERIT.

A. Forfeiting the Property Interest of Uninvolved Co-Owners Does Not Violate the Takings Clause of the Fifth Amendment.

Property owners always have held their interest subject to the state's police power to address criminal activity. Civil forfeiture was a well-entrenched doctrine in property law prior to ratification of the Fifth Amendment. In *The Common Law*, Justice Holmes addresses the history of the liability of inanimate objects. He states,

> "Where a man killeth another with the sword of John at Stile, the sword shall be forfeit as deodand, and yet no default is in the owner." That is from a book written in the reign of Henry VIII., about 1530.

Oliver Wendell Holmes, Jr., *The Common Law* 25 (Little, Brown and Company 1923) (1881) (citations omitted).

The Court long has recognized the deep historical roots of forfeiture. *In Brig Malek Adhel*,[16] the Court interpreted a federal statute enacted in 1819, that allowed the forfeiture of ships intimately involved in piracy or piratical

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[15] The American Bankers Association's brief also references federal legislation, on civil asset forfeiture, solicitous of innocent owners. *Id.* at 11. However, in the context of statutory forfeitures, the Court already has stated that the validity of a state statute is not contingent upon narrower federal statutes. *See Van Oster*, 272 U.S. at 468.

[16] 43 U.S. (2 How.) 210 (1844).

aggression.[17] The Court held that because the statute made no exception for violations done without the owner's cooperation, the innocence of the owner could not preclude forfeiture. More recently, in *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974), the Court referenced the long history of forfeiture statutes in our legal tradition. This history rarely has entailed the ability of property owners to impede forfeiture on the basis of innocence. Justice Brennan, in *Calero-Toledo*, writes:

> But "[l]ong before the adoption of the Constitution the common law courts in the Colonies—and later in the states during the period of the Confederation—were exercising jurisdiction *in rem* in the enforcement of [English and local] forfeiture statutes" . . .
>
> The enactment of forfeiture statutes has not abated; contemporary federal and state forfeiture statutes reach virtually any type of property that might be used in the conduct of a criminal enterprise.
>
> Despite this proliferation of forfeiture enactments, the innocence of the owner of property subject to forfeiture has almost uniformly been rejected as a defense.

Id. at 683 (citations omitted) (internal brackets in the original).

The above-referenced history clarifies that Takings jurisprudence has entailed the state's power to abate, by forfeiture, nuisances without compensating property owners. The bundle of sticks constituting an individual's property is created by state law. That bundle has never mandated compensation when an uninvolved owner's interest was extinguished in abatement of a public nuisance. By contrast, the bundle always has been qualified by the

[17] In fact, "Federal forfeiture legislation in the United States can be traced back to the first session of Congress." Terrance G. Reed, Article: *On the Importance of Being Civil: Constitutional Limitations on Civil Forfeiture*, 39 N.Y.L. Sch. L. Rev. 255, 256 (1994) (citing legislation enacted on July 31, 1789).

doctrine of *sic utere tuo ut alienum non laedas*.[18] The Michigan statute subjecting the Bennis car to possible forfeiture is an outgrowth of this doctrine. Consequently, the Court's reasoning in *Lucas v. South Carolina Coastal Council*, 112 S.Ct. 2886 (1992), is particularly applicable to the Respondent's position. Civil forfeiture has long been a "background principle[] of the State's law of property and nuisance already place[d] upon . . . ownership." *Id.* at 2900.

In *Calero-Toledo*, the Court specifically upheld the forfeiture of a yacht against a Fifth Amendment, Takings Clause challenge.[19] A lessee of the vessel had violated a Puerto Rico statute regarding use of controlled substances. The yacht was seized and subject to forfeiture. The lessor-owner challenged the forfeiture arguing, *inter alia*, that it deprived him of property without just compensation. He asserted that his lack of knowledge and involvement in the underlying criminal enterprise was of constitutional significance. The Court held otherwise. After referencing the history of its civil forfeiture jurisprudence, the Court stated,

> Judicial inquiry into the guilt or innocence of the owner could be dispensed with . . . state lawmakers, in the exercise of the police power, were free to determine that certain uses of property were undesirable and then establish "a secondary defense against a forbidden use . . ."

Id. at 686 (quoting *Van Oster v. Kansas*, 272 U.S. 465, 467 (1926)).

Contrary to the Petitioner's argument, *Calero-Toledo* is not distinguishable in terms of some hidden level of culpability applied to the lessor-owner. Petitioner argues that *Calero-Toledo* involved an owner innocent of only

[18] *See Black's Law Dictionary* 1380 (6th ed. 1990).

[19] 416 U.S. 663 (1974).

criminal wrongdoing.[20] The holding, under this interpretation, does not apply to owners innocent of any and all wrongdoing, including negligence. However, a close reading of the opinion belies the Petitioner's interpretation. Two justices dissented from the majority, specifically arguing that "the forfeiture of property belonging to an innocent and nonnegligent owner violates the Fifth and Fourteenth Amendments." *Id.* at 690-91.[21] The majority's reasoning then implicitly encompassed the owner's lack of negligence.[22]

B. The Power of a State to Subject a Co-Owner's Interest to Forfeiture Should Not Be Controlled by State Property Law Doctrines Taken Out of Context.

The Court's decisions already suggest that the states have substantial room statutorily to induce vigilance from uninvolved co-owners. Communities need this room to build additional deterrence to certain illegal activity. To the extent discussion of inducement and deterrence suggests a negligence standard, the duty of care is more expansive than Petitioner would concede.

Recent decisions clarify that the constitutional focus, in civil forfeiture proceedings, is on the owner's responsibility and power to deter property misuse and his exercise of that power. In *Calero-Toledo*, the Court suggests that a state can induce innocent co-owners to be more cognizant of how their property is used, where the co-owner has the means to influence that use. The Court quotes Chief Justice Marshall as stating, "[A] forfeiture can only be applied to those cases in which the means that are prescribed for the prevention of the forfeiture may be

[20] Brief for Petitioner at 27-28.

[21] Justice Stewart and Justice Douglas argued this point.

[22] Indeed, Justice Douglas' dissent points out that "only one marihuana cigarette was found on the yacht." *Calero-Toledo*, 416 U.S. at 693 (Douglas, J., dissenting).

employed." *Calero-Toledo*, 416 U.S. at 689 (quoting *Peisch v. Ware*, 8 U.S. (4 Cranch) 347, 363 (1808)). The means to prevent illegal use of the property, for example, are not present when the property has been stolen. The Court also asks whether the owner has done all that reasonably could be expected of him or her to prevent the illegal use of the property. *Id.* Yet, an uninvolved co-owner would have to know of the specific illegal use in order to take reasonable steps to prevent it. As a result, the Court is willing to place a heavy burden on owners who anticipate the misuse.

In *Austin v. United States*,[23] the Court again suggests that the deterrence permissibly effected by forfeiture of an uninvolved co-owner's property interest is defined by power—even more than knowledge. Addressing its ruling in *Calero-Toledo*, the Court states, "[W]e have permitted punishment in the absence of conscious wrongdoing, so long as the defendant was not '*powerless*' to prevent or correct the violation." *Id.* at 2810 n.11 (citing *United States v. Park*, 421 U.S. 658, 673 (1975)) (emphasis added).[24]

The states' ability to create a "secondary defense" to certain criminal conduct should not be defined by the

[23] 113 S.Ct. 2801 (1993).

[24] The Court's jurisprudence on "public welfare offenses" generally supports this reasoning. In *Morissette v. United States*, 342 U.S. 246 (1952), the Court implicitly approved of a category of criminal statutes that did not require inquiry into the individual's state of mind. Such statutes created a form of strict liability in the criminal law. The Court approvingly found that they "heighten the duties of those in control of particular . . . activities that affect public health, safety or welfare." *Id.* at 254. The Court also referenced an earlier opinion by Chief Justice Taft who referred to,

> regulatory measures in the exercise of what is called the police power where the emphasis of the statute is evidently upon achievement of some social betterment rather than the punishment of the crimes.

Id. at 258-59 (quoting *United States v. Balint*, 258 U.S. 250, 252 (1922)).

strictly legal pressures an uninvolved co-owner can exert on another co-owner. Petitioner argues that a co-owner's property interest in an abatable nuisance should be subject to forfeiture only if there has been negligent entrustment. Petitioner then refers to the Restatement (Second) of Torts § 308 (1965) as defining negligent entrustment.[25] Ostensibly, this section exposes the co-owner to liability where she is able, to some extent, to control the property. However, Comment (*a*) to Section 308 defines control as the ability of the owner to demand her consent for using the property.[26] State property law in turn determines the ability of a property owner to demand her consent. Petitioner's property interest then could be forfeited only if she could have obtained an injunction against her husband for any use of their car.

Petitioner's negligent entrustment standard would not apply to many co-ownership arrangements. Specifically, the standard rarely would apply to married co-owners. A co-owner married to the other co-owner cannot demand her consent before her spouse uses their property. Under state property law, each spouse normally can use the entire property as he or she wishes, without prior consent. The negligent entrustment doctrine would effectively preclude states from subjecting much co-owned property to forfeiture.

The only difference between the Petitioner and the owner in *Calero-Toledo* is the timing of when each un-

[25] Section 308 states:

> It is negligence to permit a third person to use a thing or to engage in an activity which is under the control of the actor, if the actor knows or should know that such person intends or is likely to use the thing or to conduct himself in the activity in such a manner as to create an unreasonable risk of harm to others.

The Petitioner would modify § 308 by replacing the language "in such a manner as to create an unreasonable risk of harm to others" with "in a manner proscribed by law".

[26] *See id.* at 100, cmt. a.

involved owner decided to share her or his property with another. In *Calero-Toledo,* the decision was made after the owner obtained title. In the instant litigation, the decision to share the property was made before the owner obtained title. Nevertheless, each of the decisions triggered issues of responsibility. State civil forfeiture laws should be allowed to address an owner's responsibility for those who use her property—whether the users are lessees or co-owners.

IV. PLACING THE BURDEN OF PROVING INNOCENCE ON THE CO-OWNER DOES NOT VIOLATE PROCEDURAL DUE PROCESS UNDER THE FOURTEENTH AMENDMENT.

The Court's interpretation of federal statutes permitting forfeiture of property does not evidence a concern that the owner must prove her lack of knowledge or consent. For example, in *Austin* the government had to show probable cause that the subject property was put to prohibited use.[27] The burden then shifted to the property owner to show that her interest was protected.[28] In applying the Eighth Amendment's restrictions against excessive fines, no member of the Court suggested that the statute's burden allocation was unconstitutional.

The Court's lack of constitutional concern is readily defensible given the nature of civil forfeiture proceedings. The burden can be met by a preponderance of the evidence.[29]

The spousal context of the instant litigation further demonstrates why the co-owner alleging innocence should

[27] *Austin,* 113 S.Ct. at 2815 (Scalia, J., concurring in part and concurring in the judgment). The statute at issue was 21 U.S.C. § 881.

[28] *Id. See* 21 U.S.C. § 881(a)(4)(C).

[29] *Cf.* David J. Stone, *The Opportunity of* Austin v. United States: *Toward A Functional Approach to Civil Forfeiture and the Eighth Amendment,* 73 Boston U. L. Rev. 427, 432 (1993) (discussing the burden of proof under various federal statutes).

bear the burden of proof. Whatever standard, if any, the Court adopts in protecting the uninvolved owner's property interest, that owner will have better access to the evidence of innocence. Moreover, the evidentiary rules protecting the marital unit might effectively preclude the state from proving any form of negligence.[30]

Lastly, the potential for abuse inherent in a defense that can preclude or impede forfeiture suggests that the burden of proof rest with the owner. Otherwise, criminals may be encouraged to place property partly or entirely in the names of their spouses, relatives, or friends to immunize it from seizure.

CONCLUSION

Communities increasingly are facing threats to neighborhood integrity. To fight these threats various approaches are being explored that focus on both the supply and demand side of criminal conduct. While state electorates struggle to balance competing interests in exploring these approaches, the Court should not constitutionally narrow the alternatives.

The states should be allowed to induce co-owners to be mindful of community concerns. If one co-owner uses shared property as an abatable nuisance, the other co-owner should not be allowed to impede forfeiture actions against the property. Co-ownership, in some cases, involves responsibility for the actions of another. In *Dobbins's Distillery v. United States*, 96 U.S. 395 (1877), the Court addressed the forfeiture of certain real and personal property. The lessee of the property was charged with defrauding the government. The leased property was thereby subject to forfeiture regardless of the lessor's lack of knowledge of the misconduct. The Court concluded, "[I]f the lessee abuses [the lessor's] trust, it is a matter to be settled between him and his lessor." *Id.* at 404. Likewise, when Mr. Bennis abused the trust of the Petitioner, it was proper for the State to make such misconduct a matter to be settled between Petitioner and her husband.

[30] Testimonial immunity and the marital communications privilege often apply only in criminal cases. However, courts and commentators have labeled the forfeiture proceeding "quasi criminal." *See, e.g.*, Terrance G. Reed, *Article: On The Importance of Being Civil: Constitutional Limitations On Civil: Forfeiture*, 39 N.Y.L. Sch. L. Rev. 255, 261-62 (1994) (citing *Boyd v. United States*, 116 U.S. 616 (1886)). Consequently, the aforementioned spousal privileges may become a significant issue in civil forfeiture proceedings involving married co-owners.

Respectfully submitted,

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